Petition

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NO. 82 —

In The Supreme Court of the United States

OCTOBER TERM 1981

FRANCES E. PORCHER, in her official capacity as Claims adjudicator of the South Carolina Employment Security Commission, H. C. SLOAN, in his official capacity as Appeals Referee of the South Carolina Employment Security Commission, C. LEM HARPER, in his official capacity as Chairman of the South Carolina Employment Security Commission, CECIL SANDIFER, in his official capacity as Vice Chairman of the South Carolina Employment Security Commission, and FRANK E. BALDWIN, JR., in his official capacity as Commissioner of the South Carolina Employment Security Commission,

Petitioners,

vs.

MARY E. BROWN, on behalf of herself and all others similarly situated, and LIBERIA JOHNSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the South Carolina Employment Security Commission denied unemployment compensation benefits to class members solely on the basis of pregnancy, in violation of the Federal Unemployment Tax Act, when it denies benefits generally to all claimants who are unemployed because of a physical disability not related to one's employment?

2. Whether the Eleventh Amendment permits a retroactive award of benefits from the South Carolina unemployment compensation fund?

3. Whether the doctrine of non-retroactivity may be applied to a case of first impression construing a statute?

4. Whether 42 U.S.C. § 1983 provides a private remedy to enforce the provisions of the Federal Unemployment Tax Act, 28 U.S.C. § 3304(a)?

TABLE OF CONTENTS AND OF AUTHORITIES

PAGE

Questions Presented for Review i
Table of Contents and of Authorities ii
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement of the Case 3
Reasons for Granting Writ 5
Conclusion 16
Appendix A: Order of the Court of Appeals 17
Appendix B: Opinion of the Court of Appeals 18
Appendix C: Opinion of the District Court 28
Appendix D: Order of the District Court 55

AUTHORITIES

Cases: *Page*

Allen v. State Board of Elections, 393 U.S. 544 (1969) 13,14

California Dept. of Human Resources v. Java, 402 U.S. 121 (1971) 6

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 6

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 16

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 13,14

Edelman v. Jordan, 415 U.S. 651 (1974) 11,12,13

Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944) 12,13

Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946) 12,13

Maine v. Thiboutot, 448 U.S. 1 (1980) 14

Middlesex County Sewerage Authority v. National Sea Clammers Association, ___ U.S. ___, 69 L.Ed.2d 435 (1981) 14,15

Miller v. Youakin, 440 U.S. 125 (1979) 11

Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 67 L.Ed.2d 694 (1981) 14,15,16

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 6,16

Stone Mfg. Co. v. South Carolina Employment Security Commission, 219 S.C. 239, 64 S.E. 2d 644 (1951) 4

Turner v. Dept. of Employment Security, 423 U.S. 44 (1975) 8,9

Page

United States Constitution:

Eleventh Amendment 2,11,12,13

Statutes:

United States Code:

26 U.S.C. § 3301 15

26 U.S.C. § 3302 15

26 U.S.C. § 3304 ..... *passim*

26 U.S.C. § 3310 15

28 U.S.C. § 1254 1

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

42 U.S.C. § 1983 2,4,15,16

42 U.S.C. § 2000e(k) 8

Code of Laws of South Carolina:

§ 41-31-380 12

§ 41-33-10(10) 12

§ 41-33-30 12

Miscellaneous:

Hearings before the Subcommittee on Unemployment Compensation of the Committee on Ways and Means, 94th Cong., 1st Sess. 9,10

H.Rep. No. 615, 74th Cong., 1st Sess. 7

H.Rep. No. 94-755, 94th Cong., 1st Sess. 9

Sen.Rep. No. 628, 74th Cong., 1st Sess. 6

Sen.Rep. No. 94-1265, 94th Cong., 1st Sess. 9

OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and refusing suggestion for rehearing in banc, filed January 22, 1982, is unreported and is appended hereto at p. 17.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District of South Carolina, reported at 660 F.2d 1001, is appended hereto at p. 18.

The opinion of the United States District Court for the District of South Carolina, awarding judgment for respondents on the merits and reported at 502 F.Supp. 946, is appended hereto at p. 28.

The unreported order of the United States District Court for the District of South Carolina denying petitioners' motion for summary judgment is appended hereto at p. 55.

JURISDICTION

This petition for writ of certiorari is for review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 6, 1981. By order filed January 22, 1982, petition for rehearing and suggestion for rehearing en banc were denied.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Unemployment Tax Act
(26 U.S.C. § 3304)

Section 3304(a) *Requirements.* The Secretary of Labor shall approve any state law submitted to him, within 30 days of such submission, which he finds provides that —

* * *

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy;

Civil Rights Act
(42 U.S.C. § 1983)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Eleventh Amendment, U.S. Constitution

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

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STATEMENT OF THE CASE

This class action was filed against officials of the South Carolina Employment Security Commission by two women who had been denied unemployment compensation by the Commission. The Commission's decisions were based on state

laws and regulations which deny unemployment compensation to anyone who voluntarily leaves work for reasons of personal health.[1] The respondents left work because they were pregnant.

The action was brought pursuant to 42 U.S.C. § 1983, with jurisdiction founded on 28 U.S.C. §§ 1331 and 1343. The District Court certified the case as a class action. The respondents sought declaratory and injunctive relief which would prohibit the Commission from denying unemployment compensation to women who voluntarily leave work because of pregnancy.[2]

The basis of respondents' case is a provision in the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) which prohibits the denial of benefits "*solely* on the basis of pregnancy (emphasis added)." (Respondents also alleged the unconstitutionality of the Commission's practice, but neither the District Court nor the Court of Appeals reached the issue of constitutionality; see 660 F.2d at 1003, n.2).

The case was instituted on March 31, 1979. On February 13, 1980, the District Court denied petitioners' motion for summary judgment which was based on the Eleventh Amendment. On October 22, 1980, following a bench trial,[3] the District Court determined that 26 U.S.C. § 3304(a)(12) was intended by Congress to require unemployment compensation to be paid (beginning with claims that matured on January 1, 1978, the act's effective date) to the respondents and those similarly situated even though no other persons who voluntarily left work because of personal health could be

[1]At least 17 states disqualify persons who leave work for personal health reasons; see U.S. Dept. of Labor, Comparison of State Unemployment Insurance Laws, pp. 4-6, 4-27, 28. (South Carolina is not listed, but is in the same category through case law and administrative decisions; see, e.g., *Stone Mfg. Co. v. S.C. Emp. Sec. Comm.*, 219 S.C. 239, 64 S.E.2d 644 (1951).) These provisions, insofar as they apply to ordinary cases of disability, are in an area which Congress has left to the states.

[2]No challenge was made to the Commission's general practice of denying benefits to persons who quit work for health reasons, except insofar as that practice affected pregnant women.

[3]The facts of the case are essentially undisputed.

awarded such compensation.[4] The Court of Appeals affirmed, essentially for the same reasons set forth in the District Court's opinion. 660 F.2d 1001 (4th Cir. 1981).

A petition for rehearing and suggestion for rehearing en banc were filed with the Fourth Circuit by petitioners. The petition was denied on January 22, 1982. By consent order, (subject to possible additional motions in this Court), some payments are beginning to be made and others have been stayed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has ordered the retroactive payment of approximately 4.9 million dollars from South Carolina's hard-pressed[5] unemployment compensation fund, and will further cause nearly two million dollars to be paid annually in future years. The decision may have a similar impact on two states within the Circuit (Maryland and West Virginia) and could lead to similar requirements in a number of other states as well. Moreover, the decision of the Fourth Circuit undermines the principles of federalism under which the unemployment compensation laws were conceived and have since been operated. The evidence refutes the suggestion that the federal government, through the Secretary of Labor, ever intended to regulate State systems in the detail required by the Court's decision; the decision, indeed, disregards the practice of the Department of Labor to leave the question at issue to the states. Furthermore, the decision conflicts with prior decisions of this Court regarding Eleventh Amendment immunity and the non-retroactive application of judgments generally. Finally the decision presents an important question of federal law insofar as it implies a private right of action to enforce the Federal Unemployment Tax Act.

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[4]At issue is whether compensation should be paid once pregnancy has ended and the woman is again physically able to work. Respondents do not contend that payments should have been made during the period of physical incapacity.

[5]In February 1982, unemployment in South Carolina was 11.4%, 1.5% higher than the national average.

A.

The decision of the Court of Appeals extends federal control of unemployment compensation into areas which Congress has never intended to enter.

The history of the federal-state cooperative unemployment insurance system has been documented in several decisions of this Court. *See generally, Steward Machine Co. v. Davis,* 301 U.S. 548 (1937); *California Dept. of Human Resources v. Java,* 402 U.S. 121 (1971). In *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 526 (1937), the Court described the program as "a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other." The states could not have enacted such programs by themselves because some states would have sought a competitive advantage by not enacting such legislation. The power of the federal government was also viewed as limited because of the variety of types and durations of unemployment in different regions of the nation.

Thus the present federal-state system was created in the late 1930's, beginning in 1935 with the passage of the Social Security Act, 49 Stat. 620, followed quickly by the passage of unemployment compensation acts by all the states. In practice, employers pay a tax, nine-tenths of which goes into a state fund for the payment of benefits for unemployed workers and one-tenth of which goes to the federal government for state and federal administrative expenses. As prerequisites for approval of state unemployment compensation laws, the federal government has established "fundamental standards." *Steward Machine Co., supra,* 201 U.S. at 594, in 26 U.S.C. § 3304. These standards were enacted "to make certain that the States actually have unemployment compensation laws, rather than mere relief measures." Sen.Rep. No. 628 (to accompany HR 7260), 74th Cong., 1st Sess., at 12 (1935). Once this aim became secure, Congress intended to leave the details of the programs to the states:

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, *the States are left free to set up any unemployment compensation systems they wish, without dictation from Washington.*
>
> *Id.* at 13. (emphasis added).

Accord, H.Rep. No. 615 (to accompany H.R. 7260), 74th Cong., 1st Sess. at 7-8.

These "fundamental standards," six in number in 1935, have swollen to seventeen in the present 26 U.S.C. § 3304. The essential character of the standards, however, has not changed from the original aim of maintaining a true unemployment compensation system, at least until the Court of Appeals set forth in its interpretation of 26 U.S.C. § 3304(a)(12) in this case. Under the Court's interpretation, Congress has moved away from prescribing the standards necessary to insure that a true unemployment compensation system exists and has elected to enter a field which had been left to the states, namely, the prescribing of such details as what may disqualify a person for benefits. This, however, has never been the intent of Congress. Moreover, if specific classes of unemployed persons (such as pregnant or formerly pregnant women) are to receive benefits, the program will move in the opposite direction (i.e., toward being "relief") from the one originally intended. In addition, the program would cease to be insurance against economic uncertainty and would instead become a form of health insurance.[6]

The Court of Appeals decision requires the states to do more for unemployed pregnant or formerly pregnant women than Title VII, as amended, requires employers to do for

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[6]The possibility also exists that South Carolina and other states will be forced to make all health-related terminations subject to coverage, in order to prevent a challenge to the practice of only covering one type of health-related termination for reasons not rationally distinguishable from any other.

employed pregnant women. Title VII (42 U.S.C. § 2000e(k), as amended in 1978) provides that "women affected by pregnancy, childbirth, or other related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." It strains credulity to suggest that Congress intended for pregnant women to enjoy the same rights as others physically disabled when they are on the job, but that they were intended to have an elevated status once their employment had ceased.

The few,[7] but consistent, references in the legislative history of 26 U.S.C. § 3304(a)(12) indicate that Congress intended only that pregnant women were to be treated the same as others similarly situated (i.e., other physically disabled persons). The provision was first formulated in 1975, when a number of states had "pregnancy disqualifications," i.e., provisions which deemed pregnant women "unable and unavailable" for work within a fixed number of weeks before and after childbirth. These provisions were becoming the subject of litigation because the presumed period of unavailability often bore no relation to the woman's actual ability to work. In late 1975, one such provision was held unconstitutional in *Turner v. Dept. of Employment Security*, 423 U.S. 44. *Turner*, however, only affected one state (Utah). In order to change the remaining similar statutes in approximately 20 states without the need for individual court challenges, Congress made the enforcement of *Turner* an administrative matter, to be accomplished by approval or disapproval of state laws by the Secretary of Labor. The constitutional requirement of *Turner* was put into 26 U.S.C. § 3304(a)(12) because it was a constitutional requirement, not, as the lower court thought, because Congress suddenly decided to legislate in the field of unemployment compensation disqualifications.

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[7]The relative lack of discussion of this provision in the legislative history is explained by the fact that it was part of a large unemployment legislation package which included highly controversial matters not here relevant.

When Congress added 26 U.S.C. § 3304(a)(12) in 1976, the Senate Report referred *only* to *Turner* and to other automatic-disqualification provisions.[8] Sen Rep. No. 94-1265 (1976) at 19-21. The House Report was similar: in referring to the need for individualized rather than automatic determination of the worker's ability to return to work, it indicated an intent to abolish fixed, automatic periods of disqualification, as *Turner, supra,* did. H.Rep. (Ways & Means Committee) No. 94-755 (1975) at 50.

The most revealing insight into the problem which Congress intended to face is found in the hearings before the House subcommittee which in 1975 was considering changes in the unemployment laws.[9] Rep. Corman, author of the bill which eventually became P.L. 94-566 and which contained the pregnancy clause, stated that

> [W]e are talking about disqualification of a worker because she has a physical condition that does not prevent [sic] her ability to work [i.e., an automatic disqualifier].
>
> Hearings, Phase I, supra n. 9 at 87.

Ms. Margaret Dahm, Director of the Department of Labor's Office of Research Legislation relating to unemployment compensation, also stated that the problem was

> the special provision for disqualifications in cases of pregnancy which treats inability to work because of pregnancy . . . as different from any other kind of physical disability.

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[8]South Carolina's policy has never been counted when lists of *Turner*-type state laws have been compiled. The reason for this is that South Carolina's policy is not one of automatic disqualification: under certain conditions, evidence of which is in the record, pregnant women can and have been held entitled to unemployment compensation benefits in South Carolina, even when they left work because of pregnancy.

[9]Printed under the title "Hearings before the Subcommittee on Unemployment Compensation of the Committee on Ways and Means, 94th Cong., 1st Sess. (in two volumes, one containing Phases I and II of the hearings, the other containing Phase III).

* * *

"[T]he ability to work of a pregnant woman should be considered *on the same basis as the ability to work of any worker.*

Id. (emphasis added).

In anotner exchange, Congresswoman Keys asked a witness whether there was *"automatically* . . . any time in a pregnancy in which you refuse to pay unemployment benefits?" Hearings, *supra* n. 9, Phase III at 168. (emphasis added).

There can thus be little doubt that Congress intended only to remove automatic pregnancy disqualifiers. South Carolina has never had such a provision. Its policy is one of disqualifying all persons who voluntarily leave for personal health reasons and of re-qualifying those persons when they fulfill certain conditions. If a pregnant woman is fired, whether for pregnancy or for other reasons, and is still able to work, she is entitled to benefits in South Carolina, unlike the situation in states which automatically disqualified pregnant women. The Court of Appeals thus overextended the hand of Congress.

B.

The decision of the Court of Appeals overturns the administrative construction of the statute by the Department of Labor.

Faced with an unequivocal body of evidence that the Department of Labor has construed 26 U.S.C. § 3304(a)(12) as South Carolina has construed it,[10] the Court of Appeals concluded that the Department's interpretation was not

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[10]The Secretary of Labor certified to the Secretary of the Treasury that South Carolina's laws were approved as consistent with 26 U.S.C. § 3304 for the 12-month period ending October 31, 1979. In addition, the Department's Administrator, Unemployment Insurance Service, in a letter written in connection with this case, reaffirmed the Department's interpretation that the statute only requires pregnant claimants to be treated no differently from others who quit for reasons of personal health.

'thoroughly considered,' 660 F.2d 1001, 1004, 1005, and hence not entitled to weight. In so doing, the Court ignored the rule that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Miller v. Youakin*, 440 U.S. 125, 144 (1979). The rule is especially applicable here, where the Department was "present at the creation" of the statute in question and where its interpretation at the hearings was the same as the one expressed by the author of the bill and by others (see p. 9, supra).

C.

The decision of the Court of Appeals denying Eleventh Amendment immunity to the South Carolina Employment Security Commission conflicts with prior decisions of this Court.

The petitioners opposed the retroactive award of 4.9 million dollars in unemployment compensation benefits to class members on the ground, among others, of Eleventh Amendment immunity. Nonetheless, the Court of Appeals affirmed the Order of the District Court awarding these benefits retroactively to the effective date of the federal statute. The petitioners submit that the lower court erred.

The Court of Appeals held that the retroactive award of benefits was permitted under the Eleventh Amendment, 660 F.2d 1001, 1007 (4th Cir., 1981). It based its conclusion on a restrictive reading of *Edelman v. Jordan*, 415 U.S. 651 (1974), which limited that decision to "retroactive award[s] . . . which 'must inevitably come from the general revenues' of a state." 660 F.2d at 1006. The lower court reasoned that "[i]n this case, therefore, we must determine whether a retroactive award would be drawn from a general revenue fund of the type protected by the Court's decision in *Edelman*." *Id.* The Court of Appeals concluded that since the retroactive award would be paid out of an "insulated, separately financed state

unemployment compensation fund[,]" such an award would not violate the Eleventh Amendment. 660 F.2d at 1007.

This reasoning is in direct conflict with the decisions of this Court in *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573 (1946), and *Great Northern Life Insurance Company v. Read,* 322 U.S. 47 (1944), both cited with approval in *Edelman v. Jordan, supra* at 663. In *Kennecott Copper Corp.*, this Court held that the Eleventh Amendment barred a suit against a state official for the recovery of taxes paid under protest, even when the moneys thus claimed were "segregated," *supra* at 576, and "not conveyed into the general fund." *Supra* at 576, n. 2. In another decision upholding the immunity of the state under the Eleventh Amendment, this Court noted that it was an "immaterial difference that the money [sought to be recovered] is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer." *Great Northern Life Insurance Company v. Read,* 322 U.S. 51, 53 (1944). Nonetheless the Court of Appeals relied on that precise distinction and held that the Eleventh Amendment was no bar to the recovery of retroactive benefits against the South Carolina Employment Security Commission because the award would be paid out of a separate state fund and not out of the general revenue fund of the State. 660 F.2d at 1006-1007.

The retroactive award of benefits in this case would be paid by the South Carolina Employment Security Commission, an agency of the State, out of the unemployment compensation fund. The fund consists primarily of employer "contributions" that are "deemed taxes owing the State." § 41-31-380, § 41-33-10(1), *Code of Laws of South Carolina,* 1976. The fund is maintained and administered by the State Treasurer. § 41-33-30, *id.* Admittedly, the unemployment compensation fund is a "special fund . . . administered separate and apart from all public moneys and funds of the State." 660 F.2d at 1006. And, furthermore, "the state has expressly protected general revenues from liability" for claims against the fund.

Supra at 1007. Nonetheless, those factors were expressly found in two previous decisions of this Court not to defeat the State's Eleventh Amendment immunity. *Kennecott Copper Corp. v. State Tax Commission, supra; Great Northern Life Insurance Co. v. Read, supra.* Citing those two cases as authority, this Court held in *Edelman v. Jordan* that "a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment." *Supra,* 415 U.S. at 663. For these reasons, the decision of the Court of Appeals is in direct conflict with those decisions of this Court and it should be reversed.

D.

The decision of the Court of Appeals refusing to apply the doctrine of nonretroactivity is in direct conflict with a prior decision of this Court.

The petitioners urged the Court of Appeals to apply the test set out in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) to determine whether the judgment in this case should be applied retroactively. However, the Court of Appeals refused that test as being "inapposite," 660 F.2d at 1005, because the *Chevron* test involved "the propriety of applying a recent decision retrospectively to the great harm of a litigant who had followed a line of decisions that, until overturned, had represented the law governing his case." 660 F.2d at 1005, n. 6. The Court of Appeals determined that that test was "inapposite" here because the District Court did not "depart from or overrule prior judicial decisions." *Supra* at 1005. However, this Court, in setting out the *Chevron* test, stated expressly that it *should* be applied to determine whether a decision on an "issue of first impression" construing a *statute* should be applied retroactively. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106 (1971). This Court in articulating the *Chevron* test relied in part on its decision in *Allen v. State Board of Elections,* 393 U.S. 544 (1969), in which it declined to enforce

retroactively its decision construing the statutory language of the Voting Rights Act of 1964. *Supra* at 571. Nonetheless the Court of Appeals held that the *Chevron* test for nonretroactivity was inapplicable because the instant case did not involve "a litigant who had followed a line of cases that [were] overturned." 660 F.2d at 1005, n. 6. But neither did the defendants in *Allen*, yet the *Chevron* test was deemed applicable there. For the above reasons this decision of the Court of Appeals is in conflict with a prior decision of this Court and it should be reversed.

E.

The decision of the Court of Appeals presents an important question of federal law insofar as it permits a private right of action to enforce the Federal Unemployment Tax Act.

The decision of the Court of Appeals implied the existence of a private right of action to enforce the Federal Unemployment Tax Act (FUTA).[11] The petitioners submit that no such private right of action exists.

This Court had implied in *Maine v. Thiboutot* that a private right of action would exist pursuant to 42 U.S.C. § 1983 to enforce any federal statute. *Supra*, 448 U.S. 1, 4 (1980). However, during the last term this Court held that some federal statutes may not be enforced by a private right of

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[11]This issue was first raised by the Petitioners in their Petition for Rehearing before the Court of Appeals. They had not pressed this issue earlier because they had relied on *Maine v. Thiboutot*, 448 U.S. 1 (1980), and lower court decisions, as permitting a private right of action to enforce any federal statute. That issue was again examined, however, by this Court in *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___, 67 L.Ed. 2d 694 (1981), handed down on April 20, 1981, only fourteen days before the instant case was argued in the Court of Appeals. The decision in *Pennhurst* appeared to limit *Maine v. Thiboutot*. Then, three weeks after the instant case was argued in the Court of Appeals, the decision of this Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, ___ U.S. ___, 69 L.Ed.2d 435 (1981) was handed down, further distinguishing *Maine v. Thiboutot* with respect to the existence of a private right of action to enforce a federal statute. The Court of Appeals did not examine this question, however, because it denied the petition for rehearing.

action under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, ___ U.S. ___, 69 L.Ed.2d 435, 451 (1981); *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___, 67 L.Ed.2d 694, 705-706 (1971). The appropriate test from those decisions is:

> (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable "rights" under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Association, supra* at ___, 69 L.Ed.2d at 450.

As to the first element, "when the remedial devices provided in the act at issue are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* The Federal Unemployment Tax Act does contain such remedial devices. The act itself imposes an excise tax on employers, and further contains an elaborate system of credits against that tax based on employer contributions to a state unemployment fund certified by the Secretary of Labor as conforming to certain federal law requirements. 26 U.S.C. §§ 3301, 3302. (The federal statute at issue in this case, 26 U.S.C. § 3304(a)(12) is one such requirement.) According to the FUTA, the Secretary is directed to review the relevant state laws annually and make or withhold his certification as to each state to the Secretary of the Treasury on October 31 of each year. 26 U.S.C. § 3304(c). Provision is then made for judicial review of the Secretary's decision, 26 U.S.C. § 3310. In this manner the Secretary of the Treasury is able to allow or disallow tax credits to employers in every state and thus enforce the federal act. No mention is made in the FUTA of a private remedy to enforce the act. Indeed a private remedy against a state would be inconsistent with the act insofar as the act is essentially a system of tax credits in the Internal Revenue Code. A private right of action against a state could result in a judgment against that state with no corresponding effect on the system of tax credits set

out in the act. This anomolous result would suggest strongly that Congress intended that there be no private right of action pursuant to the act.

As to the second element of the test for a private right of action under § 1983, this act is not one which created "rights, privileges, or immunities" within the meaning of § 1983. Section 1983 provides a cause of action for enforcement of "rights, privileges, or immunities, *secured by the Constitution and laws* . . . ." (emphasis added). *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 617 (1979). However, the "right" being claimed under 26 U.S.C. § 3304 is simply a condition imposed on a state for approval of its unemployment compensation laws to the Secretary of the Treasury. Furthermore, this "right" is expressly deemed by that act to "exist subject to the power of the legislature to amend or repeal . . . at any time." 26 U.S.C. § 3304(a)(17). *See Steward, supra,* 301 U.S. at 594. If this right claimed by the respondents exists subject to the power of the state legislature to repeal at any time, it can scarcely be said that it is a right secured by the Constitution and laws of the United States. At most the "right" provided by this act is the right to require the Secretary of Labor not to certify the state law to the Secretary of the Treasury, and even then only after the Secretary of Labor has exhausted certain specific compliance procedures against the state. 26 U.S.C. § 3304(c). But this can hardly be a right encompassed by § 1983. *See Pennhurst State School and Hospital v. Halderman, supra* at ___, 67 L.Ed.2d at 714. For these reasons the petitioners submit that the Court of Appeals erred in implying a private right to action to enforce the subject act, and the decision of the Court of Appeals should be reversed.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Office of the Attorney General
Attorneys for Petitioners

Appendix

APPENDIX A

United States Court of Appeals For the Fourth Circuit

No. 81-1077

MARY E. BROWN, et al,

Appellees,

versus

FRANCES E. PORCHER, etc., et al,

Appellants,

WOMEN'S RIGHTS PROJECT, et al,

Amici Curiae,

INTERNATIONAL UNION, et al,

Amici Curiae,

SOUTH CAROLINA CHAMBER OF COMMERCE,

Amicus Curiae,

WEST VIRGINIA DEPARTMENT OF EMPLOYMENT SECURITY,

Amicus Curiae.

ORDER

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Ervin and Judge Britt, U.S.D.J.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX B

United States Court of Appeals For the Fourth Circuit

No. 81-1077

MARY E. BROWN, on behalf of herself and all others similarly situated; LIBERIA JOHNSON,

Appellees,

vs.

FRANCES E. PORCHER, in her official capacity as Claims Adjudicator of the South Carolina Employment Security Commission; H. C. SLOAN, in his official capacity as Appeals Referee of the South Carolina Employment Security Commission; C. LEM HARPER, in his official capacity as Chairman of the South Carolina Employment Security Commission; CECIL SANDIFER, in his official capacity as Vice Chairman of the South Carolina Employment Security Commission; FRANK E. BALDWIN, JR., in his official capacity as Commissioner of the South Carolina Employment Security Commission,

Appellants.

Argued June 3, 1981.

Decided Oct. 6, 1981.

David C. Eckstrom, Asst. Atty. Gen., Columbia, S. C. (Daniel R. McLeod, Atty. Gen., C. Tolbert Goolsby, Jr., Deputy Atty. Gen.; William H. Griffin, Gen. Counsel Columbia, S. C. on brief), for appellants.

Thomas J. Rubillo, Neighborhood Legal Assistance Program, Inc., Pawleys Island, S. C. (Armand Derfner, Jill A.

Hanken, VA Poverty Law Center, Charleston, S. C., on brief), for appellees.

(Thompson, Mann & Hutson, Greenville, S. C., on brief), for amicus curiae.

Women's Rights Project and the Reproductive Freedom Project of the American Civil Liberties Union Foundation, American Civil Liberties Union of South Carolina, National Center on Women and Family Law, Inc., Women's Legal Defense Fund, amici curiae.

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America-UAW, United Steelworkers of America, AFL-CIO, National Employment Law Project, National Center on Women and Family Law, amici curiae.

Before BUTZNER, and ERVIN, Circuit Judges, and W. EARL BRITT, United States District Judge for the Eastern District of North Carolina, sitting by designation.

BUTZNER, Circuit Judge:

Title 26 U.S.C. § 3304(a)(12) provides "no person shall be denied [unemployment] compensation under . . . State law solely on the basis of pregnancy or termination of pregnancy." The principal issue in this appeal is whether this statute prohibits the South Carolina Employment Security Commission from denying women, who are available and able to work, unemployment compensation solely because they left work on account of pregnancy.[1] The district court held that the Commission's practices conflicted with § 3304(a)(12) and awarded injunctive and monetary relief to an appropriate class. We affirm this judgment with one exception: on remand the court should modify the computation of individual awards as directed in Part III of this opinion.

[1]South Carolina, like other states, requires unemployment claimants to be available and able to work before being eligible to receive unemployment compensation. The plaintiffs do not challenge this requirement, and they do not claim that pregnant women unable to work should be given unemployment compensation.

I

The district court's opinion, reported at 502 F.Supp. 946 (D.S.C.1980), recounts in detail the facts pertaining to this action. In summary, the record discloses that Mary E. Brown and Liberia Johnson, appellees, each left their respective employment due to the physical discomfort and illnesses occasioned by their pregnancies. After giving birth to their children, Brown and Johnson sought to return to their former jobs, but they were informed that the positions were no longer available. Each then filed a claim with the Commission for unemployment compensation.

The Commission denied both claims on the ground that the applicants had voluntarily quit their former jobs for personal reasons not constituting good cause. Section 41-35-120(1) of the South Carolina Code provides that a claimant shall be ineligible for benefits "[i]f the Commission finds that he has left voluntarily without good cause his most recent work . . ." Although the South Carolina statute does not mention pregnancy, the Commission has construed it to disqualify any claimant who voluntarily left her most recent employment because of pregnancy.[2]

II

We agree with the district court's conclusion that 26 U.S.C. § 3304(a)(12) prohibits the challenged South Carolina practice. Congress has required the states to comply with a limited number "fundamental standards" in order to receive the

[2]The Commission, however, awards compensation to employees whose employers grant maternity leave and to those employees who are discharged because of pregnancy. These distinctions are the basis of a claim that the Commission's practice denied the complainants equal protection of the laws. Quite properly, the district court found it unnecessary to address this constitutional issue in view of the disposition of the case on statutory grounds.

advantages of federal approval.[3] *Because* § 3304(a)(12) is a fundamental standard, the only issue is whether the challenged practice violates this statute.

Section 3304(a)(12) was enacted in the wake of *Turner v. Department of Employment Security*, 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed.2d 181 (1975). There the Court overturned, on constitutional grounds, a presumption that pregnant women could not work and therefore were ineligible for unemployment compensation. *Turner*, however, did not address the issue presented by this case.

The Commission argues that § 3304(a)(12) was intended only to eliminate the somewhat shorter presumptive periods of disqualification that some states continued to impose after *Turner* and to "prohibit states from creating a special category for pregnancy-related claims, and then denying benefits to those claimants thereby basing the denial on the fact of pregnancy alone."[4] The Commission points out that it treats pregnant women like any employee who quits a job because of ill health. Consequently, the Commission asserts, its practice does not conflict with the federal statute.

We cannot accept the Commission's argument. As the district court pointed out, § 3304(a)(12) is remedial in nature and should be broadly construed. *Tcherepnin v. Knight*, 389 U.S. 332, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967). If Congress had intended, as the Commission argues, only to codify the *Turner* decision and take the additional step of barring discrimination on the basis of pregnancy, it could easily have drafted a statute reflecting those limited purposes. Instead, it broadly provided that "[n]o person shall be denied compensation under . . . state law solely on the basis of pregnancy or

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[3]In *Steward Machine Co. v. Davis*, 301 U.S. 548, 594, 57 S.Ct. 883, 894, 81 L.Ed. 1279 (1937), the Court pointed out that a state may not "depart from those standards which in the judgment of Congress are to be ranked as fundamental" if it is to participate in the federal-state program for unemployment compensation.

[4]Appellants' brief at 21.

termination of pregnancy." These words must be interpreted "in their ordinary everyday senses." *Hanover Bank v. Commissioner*, 369 U.S. 672, 687, 82 S.Ct. 1080, 1088, 8 L.Ed.2d 187 (1962). Regardless of how the Commission treats employees with other disabilities, the mandate of the statute is clear: the Commission cannot deny compensation "solely on the basis of pregnancy or termination of pregnancy." Because the statute is unambiguous, resort to legislative history is unwarranted. Sutherland, Statutes and Statutory Construction § 46.04 (4th ed. C. Sands 1973). It may not be amiss, however, to note that nothing in the scant legislative history indicates that Congress intended the statute to be read other than literally.

Contrary to an argument advanced by the Commission, the Secretary of Labor's certification of South Carolina's compensation law pursuant to 26 U.S.C. § 3304 is neither controlling nor entitled to great weight. As we have previously mentioned, § 41-35-120 of the South Carolina Code does not mention pregnancy. Consequently, it is not facially in conflict with federal law. The Secretary's certification in summary fashion purports to approve a number of states' "unemployment compensation laws." It makes no reference to the interpretation that the South Carolina Commission has placed on the state law.

For reasons adequately explained by the district court, 502 F.Supp. at 957 n.20, we find no error in its refusal to defer to the view expressed by the Department of Labor's Administrator, Unemployment Insurance Service. In a letter solicited during the course of this litigation, the administrator wrote that § 3304(a)(12) has been interpreted to do no more than prohibit discrimination on the basis of pregnancy. As the Supreme Court has recently noted, "[t]he amount of deference due an administrative agency's interpretation of a statute . . . 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier

and later pronouncements . . . .'" *St. Martin Evangelical Lutheran Church v. South Dakota*, ___ U.S. ___, 101 S.Ct. 2142, 2148-49 n.13, 68 L.Ed.2d 612 (1981). Tested by these criteria, the letter is entitled to little weight. The administrator cites neither authority nor legislative history for the interpretation he espouses. He accepts the premise that pregnancy should be treated like any other illness without explaining how this premise can be reconciled with the exceptional treatment of pregnancy embodied in § 3304(a)(12).

We therefore conclude that the district court properly declared that the Commission's practices contravened § 3304(a)(12). We also conclude that the injunctive relief the court ordered to correct these practices is appropriate.

III

The district court also ordered the Commission to make retroactive payments to claimants who have been denied compensation since January 1, 1978.[5] The Commission challenges the award as both inequitable and violative of the eleventh amendment.

The words "retroactive" and "retrospective" have been commonly used in several different contexts. It is therefore essential to understand the context in which the court ordered "retroactive" payments in this case. The court construed § 312(c) of the Unemployment Compensation Amendments of 1976, Pub.L.No. 94-566, 90 Stat. 2667, 2679 (1976), to make § 3304(a)(12) effective January 1, 1978. *See* 26 U.S.C. § 3304 note. No party challenges this interpretation of the Act. The court awarded payments only from the effective date of § 3304(a)(12). It did not apply the statute retrospectively. Nor did the court depart from or overrule prior judicial decisions and apply a new principle retrospectively. For these reasons,

[5]The court directed the Commission to process the claims but stayed disbursement pending appeal.

cases dealing with retrospective application of statutes or innovative judicial decisions are inapposite.[6]

In short, the court enforced an Act of Congress in accordance with the date that Congress indicated it should become effective. Whether the court abused its discretion should be tested by the criteria formulated by Judge McGowan in *Rothstein v. Wyman,* 467 F.2d 226, 234 (2d Cir. 1972):

> A federal court in this situation is called upon to perform two related functions. First, in wielding equity power, it must weigh competing claims and determine where a preponderance of the equities lies. Second, as an instrumentality of the United States, it must attempt to identify and effectuate the policies of the United States, as formulated by the Congress.

Subject to an adjustment, which we will subsequently discuss, the district court's award satisfies both aspects of the *Rothstein* test.

The nature of unemployment compensation creates strong equities in favor of the claimants. The Committee on Economic Security, which in 1935 recommended unemployment insurance compensation, described the program in these terms: "This should be a contractual right not dependent on any means test." *See California Department of Human Resources Development v. Java,* 402 U.S. 121, 131, 91 S.Ct. 1347, 1353, 28 L.Ed.2d 666 (1971) (quoting the committee's report).[7] South Carolina law reflects the committee's concept. To be eligible for compensation an insured worker must satisfy minimal time and wage requirements. *See, e. g.,* S.C.Code §§

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[6]The Commission's reliance on *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92, S.Ct. 349, 30 L.Ed.2d 296 (1971), therefore is misplaced. That case dealt with the propriety of applying a recent decision retrospectively to the great harm of a litigant who had followed a line of decisions that, until overturned, had represented the law governing his case. *See* 404 U.S. at 107, 92 S.Ct. at 355.

[7]Thus, although unemployment compensation redresses a pressing need in industrial societies, it is not welfare. Consequently, cases prohibiting the retroactive payments of welfare grants deal with quite different equitable considerations.

41-27-310 and 41-35-110. After an employee has worked long enough and has earned enough to become eligible for compensation, equitable principles of fair dealing support the conclusion that he or she should be entitled to payment in accordance with state and federal statutes governing the system.

We find no significant countervailing equities in favor of the Commission. Although the award may eventually be as large as several million dollars when all claims are processed, the compensation fund will not be rendered insolvent. Administrative costs will be defrayed by federal contributions. Additionally, apart from the fund's reserves, the Commission acknowledges that retroactive payments "could likely increase individual employers' rates of contribution because of the resulting changes to their individual accounts."[8] It therefore appears that in due course through the adjustment of individual accounts the Commission can, if it chooses to do so, recoup, on an actuarial basis, sums that are attributable to the awards. Moreover, since January 1, 1978, the Commission has received substantial benefits from the federal government which the law makes available only to states that comply with standards Congress deemed fundamental. These facts indicate that the award will inflict no irreparable harm on the Commission.

We also find no compelling equity in the Commission's reliance on the Secretary's certification of the South Carolina law. Certification enabled the Commission to receive the benefits that follow federal approval, but it did not purport to resolve every claimant's entitlement to compensation. Moreover, the Commission was not prejudiced by relying on the certification. It has not shown that its reliance caused it to forego permanently significant increases in employers' contributions.

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[8]Appellants' brief at 42.

With respect to the second part of the *Rothstein* test, there can be no doubt that the district court's order effectuates "the policies of the United States, as formulated by the Congress." Congress adopted § 3304(a)(12) as a fundamental standard to prohibit a state from denying compensation solely on the basis of pregnancy. Congress postponed the effective date of this mandate to enable the states to make any necessary changes in their laws. There is no provision in the Act, nor any suggestion in the legislative history, that indicates an intent to defer implementation of the statute beyond the effective date that Congress provided.

Applying the *Rothstein* test, we conclude that the equities favor the claimants and that the district court properly gave effect to congressional policy in ordering awards from the effective date of §3304(a)(12). Not all claimants, however, now stand on equal footing. Those who have received welfare payments that would not have been available had they been receiving unemployment compensation should not be entitled to dual payments. For these claimants, the welfare payments have served as a substitute, at least in part, for the omitted compensation. Individual awards, therefore, should be reduced to this extent.

Finally, we must consider whether the award, though equitably justified, violates the bar of the eleventh amendment. In the context of the eleventh amendment, the Supreme Court has classified equitable remedies as retroactive or prospective depending on whether the remedy compensates for past delinquencies or mandates future compliance. In *Edelman v. Jordan,* 415 U.S. 651, 665, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974), the Court held that the eleventh amendment proscribes a retroactive award of welfare benefits which "must inevitably come from the general revenues" of a state. In this case therefore, we must determine whether a retroactive award would be drawn from a general revenue fund of the type protected by the Court's decision in *Edelman.*

South Carolina's unemployment compensation fund is "a special fund . . . administered separate and apart from all public moneys or funds of the State." S.C.Code § 41-33-10. The money paid into the fund consists of employer contributions, federal funding, investment income, and other receipts. S.C. Code § 41-33-10. Unemployment compensation is "deemed to be due and payable . . . to the extent that moneys are available therefor to the credit of the unemployment compensation fund and neither the State nor the Commission shall be liable for any amount in excess of such sums." S.C.Code § 41-27-630.

District courts considering the question have concluded that retroactive remedial relief may lie against state unemployment compensation funds when the funds are special and the state has expressly protected general revenues from liability. *See Bowen v. Hackett,* 387 F.Supp. 1212 (D.R.I. 1975); *accord, Bigelow v. Mesc,* [1975-1979 Transfer Binder] Unempl Ins Rep (CCH) ¶ 21,520 (E.D. Mich., May 15, 1978); *Black v. Caldwell,* [1975-1979 Transfer Binder] Unempl Ins Rep (CCH) ¶ 21,485 (N.D.Ga., Jan 6, 1976). Although no court of appeals has decided whether insulated, separately financed state unemployment compensation funds are embraced by the eleventh amendment, two courts have acknowledged the validity of the analysis undergirding *Bowen. See, e. g., Fitzpatrick v. Bitzer,* 519 F.2d 559, 564-65 (2d Cir. 1975), *aff'd in part and rev'd in part,* 427 U.S. 445, 459-60, 96 S.Ct. 2666, 2673, 49 L.Ed.2d 614 (1976) (Stevens, J., concurring); *Hutchison v. Lake Oswego School District,* 519 F.2d 961, 966 (9th Cir. 1975). Accordingly, we agree with the district court's conclusion that a retroactive award against the South Carolina Employment Security Commission does not violate the eleventh amendment.

The judgment of the district court is affirmed, subject to modification of individual awards, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX C

United States District Court, D. South Carolina, Charleston Division.

Oct. 22, 1980

MARY E. BROWN, on behalf of herself and all others similarly situated,

and *Plaintiffs,*

LIBERIA JOHNSON,

Intervening Plaintiff,

v.

FRANCES E. PORCHER, in her official capacity as Claims Adjudicator of the South Carolina Employment Security Commission, and H. C. SLOAN, in his official capacity as Appeals Referee of the South Carolina Employment Security Commission, and C. LEM HARPER, in his official capacity as Chairman of the South Carolina Employment Security Commission, and CECIL SANDIFER, in his official capacity as Vice Chairman of the South Carolina Employment Security Commission, and FRANK E. BALDWIN, JR., in his official capacity as Commissioner of the South Carolina Employment Security Commission,

Defendants.

ORDER

HAWKINS, District Judge.

INTRODUCTION

This is a case of first impression. It is a class action challenge to the policies and practices of the South Carolina Employment Security Commission which deny employment compensation to women due to pregnancy. The Employment Security Commission regularly imposes the penalty of disqualification from employment compensation upon women who are otherwise eligible for aid if they left their most recent work due to pregnancy. The disqualification is imposed based upon a routine finding that women who left work because of pregnancy voluntarily quit their most recent work without good cause. Plaintiffs contend these policies abridge federal statutory and constitutional rights. Accordingly, they seek declaratory and injunctive relief to halt implementation of the policies of which they complain. Equitable restitution is sought on behalf of those who have been injured by these policies in the past. It bears emphasizing that plaintiffs do not seek payment of unemployment compensation to women who cannot work because of pregnancy. Plaintiffs seek only to have compensation paid to women who are able to work and available for work. [1]

THE UNEMPLOYMENT COMPENSATION SYSTEM

The unemployment compensation program is a joint federal-state effort. Its purpose is to provide partial wage replacement for workers during periods of unemployment. The system was created during the Great Depression to ease the economic burden of unemployment "which so often falls with crushing force upon the unemployed worker and his family . . ." S.C. Code Ann. § 41-27-20 (1976). This cooperative system is governed by both federal and state law. Under it, benefits are paid to eligible unemployed workers from a special trust fund.

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[1]Plaintiffs' action focuses principally on those situations in which women have returned to the job market and are actively seeking work after having a child. In a few instances, the issues addressed in this action touch upon women who are seeking work while they are still pregnant.

This fund is administered "separate and apart from all public monies or funds of the state." S.C.Code Ann. § 41-33-10 (1976). The fund is composed of monies paid by employers who are subject to the State's unemployment compensation laws. The system is similar in many respects to a simple insurance system. The amount of an employer's contribution is based upon the number of insured workers in his or her employ and the number of claims made against the employer's accounts. S.C.Code Ann. § 41-31.30 (1976). It, like other fringe benefit programs for employees, provides workers with partial protection against economic loss when they are out of work. Employer contributions to the unemployment trust fund can, therefore, be fairly characterized as payments made in lieu of wages. It is not a "welfare" system, but an entitlement system.

Funds for the administration of the State's unemployment compensation program do not come from the compensation trust fund. Federal tax dollars pay these latter costs. The federal funding mechanism is set out in both the Social Security Act and the Federal Unemployment Tax Act. 42 U.S.C. § 501, *et. seq.*, and 26 U.S.C. § 3301, *et seq.* These federal laws allow the states to operate their unemployment compensation systems free from undue federal interference. However, as part of this system of operating grants, the federal government has placed a very limited number of explicit conditions on receipt of federal operating funds by the states. *See New York Tel. Co. v. New York Labor Department,* 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979). These standards apply to all states and "in the judgment of Congress are to be ranked as fundamental." *Steward Machine Co. v. Davis,* 301 U.S. 548, 594, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).[2]

[2]The leading case on the issue of fundamental standards is *California Department of Human Resources v. Java,* 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971). In that case the U.S. Supreme Court ordered the state of California to amend its procedures to comply with the federal requirement that its administrative system for payment of unemployment compensation "be reasonably calculated to insure full payment of benefits when due." 42 U.S.C. § 502(a)(1). In that action, the court allowed an individual claimant injured by California's practices to seek judicial redress under the federal funding statutes.

In the instant case, plaintiffs seek to have the court enforce one of these fundamental standards. It is plaintiffs' position that the policies and practices of the South Carolina Employment Security Commission which deny unemployment compensation to otherwise eligible women because of pregnancy, violate the fundamental federal standard set out in 26 U.S.C. § 3304(a)(12). That provision states in relevant part that "no person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy."

South Carolina Law

South Carolina's unemployment compensation law creates a three-stage process for determining whether a claimant will receive payment. The first stage is a decision regarding whether the worker is "insured" pursuant to S.C.Code Ann. § 41-27-210. If the person is not "insured", benefits are denied. If the worker is "insured", a decision is next made as to whether he or she is "eligible" for benefits. Eligibility determinations turn on the claimant's ability to work, her availability for work, and whether the claimant is actually seeking work. S.C.Code Ann. § 41-35-110. An "insured" and "eligible" worker may nonetheless be denied compensation at stage three of the process. The penalty of "disqualification" can be imposed upon an otherwise eligible claimant pursuant to S.C.Code Ann. § 41-35-120. By far the two most common reasons for disqualification are those imposed because (1) an otherwise eligible worker "has left voluntarily without good cause his most recent work", or (2) because the worker was "discharged for misconduct connected with his most recent work . . . " S.C. Code Ann. § 41-35-120(1) and (2). Payment of benefits to those discharged for misconduct generally is delayed for a number of weeks. Those found to have "voluntarily quit" their last job are "indefinitely disqualified" from receipt of benefits.[3]

[3]When disqualified "indefinitely", an insured worker can only requalify for unemployment compensation by returning to work and earning an amount equal to eight times his or her weekly benefit amount. S.C.Code Ann. § 41-35-120(1).

The South Carolina Employment Security Commission uses these two provisions — principally the "voluntary quit" provision — to deny unemployment compensation to otherwise "insured" and "eligible" women who left their most recent work because of pregnancy. It has done so since at least the year 1972.

FINDINGS OF FACT

Parties

Plaintiff Mary E. Brown and Plaintiff Liberia Johnson are two women who were denied unemployment compensation because they left their most recent work due to pregnancy. They sue on behalf of themselves and a class of other women who are similarly situated. Both plaintiffs were indefinitely disqualified from receipt of unemployment compensation based on a finding by the South Carolina Employment Security Commission that they left their most recent work "voluntarily" and "without good cause" because they were pregnant.

Plaintiff Brown

Plaintiff Mary E. Brown is a member of the Church of Christ. It is a tenet of belief within the Church of Christ that it is wrong to artificially terminate a pregnancy prior to term. Plaintiff Brown had worked full-time as a dietary aide at Georgetown County Memorial Hospital. She learned she was pregnant in December 1977. She began to experience physical discomfort and sickness sometime thereafter. Her physician advised her not to work if work became too difficult for her. On April 11, 1978, Plaintiff Brown informed her supervisor that she would be unable to work the following day. Hospital employees testified at Mrs. Brown's unemployment compensation hearing that Mrs. Brown's position at the hospital was not of the type which entitled her to a maternity leave. *See*

Transcript of Hearing, Claimant Mary E. Brown, 7.[4] It is undisputed that her last day of work was April 12, 1978.

Mrs. Brown gave birth to a son on September 14, 1978. On or about November 20, 1978, she sought to return to work but was informed by the supervisor of Food Services at the hospital that there were no openings in that department. On November 20, 1978, she applied for unemployment compensation benefits from the South Carolina Employment Security Commission. This application for aid was initially denied on December 15, 1978, by Defendant Frances E. Porcher. Defendant Porcher gave as the sole reason for the denial that:

> Claimant quit her job with [Georgetown County Memorial Hospital] on 4-12-78 due to pregnancy. This is a personal reason for quitting which is without good cause under the SCESC law and a disqualification is imposed.

The disqualification imposed was for an "indefinite" period.

Mrs. Brown appealed this initial determination. A hearing was held before Defendant H. C. Sloan on January 5, 1979. Defendant Sloan rendered his decision on January 10, 1979. The decision affirmed the indefinite disqualification which had previously been imposed.[5]

Filing a timely appeal, Mrs. Brown sought reversal of her disqualification by the South Carolina Employment Security

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[4]While there is some dispute on the record about whether or not Mrs. Brown was granted a maternity leave from the hospital, that dispute is not relevant to the issues tried in this case.

[5]In addition to disqualifying Mrs. Brown because she left her most recent work due to pregnancy, Defendant Sloan also found Mrs. Brown ineligible to receive aid. That subsequent finding of ineligibility is not at issue in this action. Eligibility determinations are made on a weekly basis. They depend upon whether a woman has looked for a job that week. The undisputed record in this case shows that during the month of January, 1979, Mrs. Brown made a number of in person job hunting contacts and was subsequently employed as a maid. (Deposition of Mary E. Brown, p. 25, line 10, through p. 29, line 25.)

Commission. On February 23, 1979, Defendants Comer[6], Baldwin and Harper, acting in their official capacities as chairman, vice-chairman and commissioner for the Commission, affirmed the determination denying Mrs. Brown unemployment compensation.

Plaintiff Johnson

Mrs. Liberia Johnson worked for Sam Solomon Co., Inc. in Charleston, S. C., for a period in excess of two years. She was a sales clerk. After becoming pregnant, she began experiencing various physical problems and sickness. She had to stop working as a result. She also believed she had been granted a maternity leave.[7] Whether she had been or not, however, is not relevant to the issues in this case. Her last day of employment at Sam Solomon Co., Inc. was sometime in August, 1978.

Mrs. Johnson's child was born on February 25, 1979. When she returned to her old employer seeking work she was advised that there was no work available for her.[8]

On April 20, 1979, Mrs. Johnson filed a claim for unemployment compensation benefits. On May 8, 1979, a claims adjudicator for the South Carolina Employment Security Commission disqualified Mrs. Johnson from receipt of benefits based upon a finding that Mrs. Johnson had quit her most recent work without good cause.

Mrs. Johnson appealed this initial determination to an appeals referee of the Commission. A hearing was held on May 30, 1979, and a decision on that appeal was rendered on June 15, 1979. The appeals referee found that Mrs. Johnson's separation from work

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[6]By oral order of this court on July 14, 1980, Comer was stricken as a defendant and was replaced by Defendant Harper in his official capacity as Chairman of the Commission, Defendant Baldwin was replaced by the naming of a new defendant, Sandifer, in his official capacity as Vice-Chairman of the Commission, and Defendant Harper was replaced by Defendant Baldwin in his official capacity as a Commissioner.

[7]Transcript of Hearing, Liberia Johnson, 1, 2.

[8]Id. 2.

. . . occurred as a result of complications resulting from pregnancy. This is a personal reason not imposed upon her by the employer. Her quitting is therefore considered to have been for a personal reason, and personal reasons do not constitute good cause for quitting available employment within the purview of the law.

A timely appeal of the decision of the appeals referee was filed with the South Carolina Employment Security Commission. Subsequently, Defendants Comer, Harper and Baldwin, acting in their official capacities as members of that Commission, affirmed the decision indefinitely disqualifying Mrs. Johnson from receipt of unemployment compensation on the grounds that she had voluntarily quit her most recent work without good cause. Mrs. Johnson has never been found otherwise ineligible to receive unemployment compensation benefits by the South Carolina Employment Security Commission.

Leave to intervene as a plaintiff in this litigation was granted to Mrs. Johnson by order of this court dated February 13, 1980. That order indicated that Mrs. Johnson was fully qualified to serve as representative of the class sought to be certified.

The record shows that Plaintiff Mary E. Brown applied for unemployment compensation on November 20, 1978. She was unemployed until on or about January 24, 1979. The record also shows that Planitiff Liberia Johnson applied for unemployment compensation on April 20, 1979. The date of her reemployment, if any, is not shown on the record.

Defendants

The named defendants in this action were or are all employees, agents or members of the South Carolina Employment Security Commission. At all relevant times, each was acting in his or her official capacity with the South Carolina Employment Security Commission. All defendants

are residents of the State of South Carolina and are subject to the jurisdiction of this court.

Policies

The policies at issue in this action are described in an official document published by the South Carolina Employment Security Commission. That document is entitled *Payment of Benefits to Pregnant and Post-Pregnant Claimants.* It reads in relevant part:

2. Any individual who voluntarily leaves her most recent work because of pregnancy is subject to the same disqualification provision of . . . the South Carolina Employment Security Law as any other individual who voluntarily leaves for a personal reason not attributable to the employment.

3. An individual who is separated by the employer because of pregnancy will not be subject to a disqualification period under . . . the Law.

4. A claimant who is separated from an employer because of a policy which provides for separation of a woman worker after a certain stage of pregnancy will not be subject to any disqualification under . . . the Law.

5. If an individual accepts a maternity leave of absence for a definite period, the Commission's policy governing leaves of absence will be followed if a claim is filed prior to the expiration thereof or after the claimant does not report back for duty.

(Unemployment Compensation Instruction MC-135 dated October 16, 1972. This document has not been superceded.)[9]

[9]A review of decisions introduced into evidence in this case reveals the Commission's policy regarding maternity leaves of absence. In brief, a claimant will be denied unemployment compensation if there is no job available for her when she returns to work after maternity leave if (1) her leave did not have a definite termination date (Decisions # 78-a-278 and # 78-a-617), or (2) *if she attempts to return to work prior to the end of her maternity leave* (Decision # 78-A-98). If the employer's policy is not to provide workers with maternity leave, no benefits are paid despite the fact that an individual claimant is able to work and available for work (Decision # 78-A-194).

A document routinely distributed to claimants for unemployment compensation by employees of the South Carolina Employment Security Commission describes Commission policy as follows:

> The South Carolina Employment Security Law provides in Section 41-35-120(1) that if the Commission finds that a claimant voluntarily left his most recent employment without good cause, such claimant shall be ineligible for benefits from the effective date of the claim and continuing until he has performed services in covered employment for one or more employers and has earned wages for such services in an amount equal to not less than eight times the weekly benefit amount established for such individual. The South Carolina Supreme Court has interpreted the words "good cause" to mean a cause attributable to or connected with the claimant's employment.
>
> Personal reasons, therefore, do not constitute good cause for quitting. Examples of such personal reasons are as follows:
>
> * * *
>
> (d) Due to pregnancy.
>
> * * *
>
> The individual who quits because he is dissatisfied with his job or for personal reasons as stated above will be disqualified for quitting without good cause.

(document UCB-236, Rev. 11/77)

These policies are applied more or less uniformly in all pregnancy-related cases.[10] They were used to disqualify indefinitely both plaintiffs from receipt of unemployment compensation benefits. They are also applied on all levels of the decision-making process and in a wide variety of factual settings. The policies were effectuated, for example, in a case decided by the Commission itself. In that case, the Commission imposed an indefinite disqualification on a female security guard who left work to get away from an x-ray machine. After becoming pregnant, the woman was informed by her doctor that she could not continue working around x-rays. The employer had no other job available for the woman. Nonetheless, the Commission found "her reason for quitting was not connected to or attributable to her employment" and an indefinite disqualification from receipt of unemployment compensation was imposed (Decision # 79-C-265).

In another case, a woman's maternity leave had been rescinded by her employer. The company only granted leaves to workers after they had been with the firm for more than one year. The woman had been with the company for nine months. After having her child, the claimant was disqualified from receipt of unemployment benefits by an appeals referee for the Commission for having voluntarily quit her most recent work without good cause (Decision # 78-A-2403).

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[10]Although the stated policy says that a woman who is fired because she was pregnant should receive benefits, some women found to have been discharged from their jobs because of pregnancy have been disqualified from aid under the "misconduct" provision of S.C.Code Ann. § 41-35-120(2). In the case of one Minnie S . . . . ., a claims adjudicator, on May 20, 1980 found that a claimant that who left work four days before the birth of her child should be disqualified under the "misconduct" subsection because Ms. S . . . . .'s "[a]bsentecism, although for compelling reasons, shows a disregard for employer's interest." In Decision # 78-A-1732, a disqualification was imposed upon a woman who was discharged even though ". . . her reasons for being absent were of a compelling nature. . . ." In addition, Decision # 78-A-5528, involving a woman who was fired by her employer because she was hospitalized for five days for pregnancy-related testing, imposed disqualification on a finding that the woman had been discharged for work connected cause.

An additional application of the Commission's policies was made in case # 78-A-4510. In that case, a legal secretary had become pregnant and was granted a maternity leave. The law firm for which she worked dissolved during her absence and there was no work available for her at the end of her leave. An appeals referee stated that:

> Had claimant not been on maternity leave at the time the law partnership was dissolved, she would have been laid off due to lack of work, and would therefore have been eligible for benefits. However, since she was on pregnancy leave, at the time, she does not qualify for benefits. Her separation is considered to have been the result of personal factors.

An indefinite disqualification was imposed.

Another case involving the challenged policies contains the following findings of fact by an appeals referee for the Commission:

> The employer had a policy for some of its departments requiring that employees immediately report pregnancy. This policy was necessitated by the existence of some evidence that materials used in those departments could be harmful to a human fetus.
>
> Claimant was aware of this evidence of the possibility of harm to her baby. Claimant indicated this concern to her employer and separation took place on mutual agreement between herself and the employer and involved medical personnel. Employer conceded that legitimate evidence does exist which would tend to reinforce claimant's concern.

In the fact of these findings, the appeals referee imposed a disqualification. The disqualification was for a five-week period. (The initial claims adjudication had imposed an indefinite disqualification as required by S.C.Code Ann. § 41-35-120(1)). (Decision # 79-A-549.)

The Commission's policy also was given effect in the case of a nurse's aide who refused a 90-day maternity leave; she believed it too short because she had encountered complications associated with her pregnancy. Three weeks after resigning, she suffered a miscarriage. When she returned to her prior employer, there was no work available for her. She was disqualified indefinitely from receipt of unemployment compensation (Decision # 78-A-3376).

Receipt of Federal Funds

The South Carolina Employment Security Commission receives approximately 25 million dollars per year from the United States Department of Labor to pay for the cost of administering this State's unemployment compensation program. Accordingly, policies and practices must conform to the "fundamental standards" set out in relevant federal laws.

CONCLUSIONS OF LAW

Jurisdiction

This court has personal jurisdiction over all of the defendants. It also has subject matter jurisdiction over the matters at issue in this action pursuant to 28 U.S.C. § 1337, 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) and (4), providing for jurisdiction in District Court for claims arising out of violations of 42 U.S.C. § 1983. Jurisdiction also exists pursuant to the doctrine of pendent jurisdiction.

Class Certification

All of the prerequisites of a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure have been met in this action.[11]

[11]This court has previously held that plaintiffs' claim for amounts withheld pursuant to the policies and practices challenged in this action is not barred by the Eleventh Amendment to the United States Constitution. *Order*, February 13, 1980.

The class certified in this action is described as being composed of:

> Those workers who have been, are or will be insured under the South Carolina Employment Security law, who became or will become pregnant and thereafter whose employment terminated or will terminate for reasons arising out of their pregnancy, and who made or will make claims for unemployment compensation, who for any given week while their claim was, is or will be pending, were, are or will be able to work and available for work, and who were or would otherwise be disqualified from receipt of unemployment compensation benefits pursuant to S.C.Code Ann. § 41-35-120(1) or (2).[12]

As previously ordered by this court, plaintiff Liberia Johnson is fully qualified to serve as representative of the class of plaintiffs in this action.[13]

Defendants' Systematic Denial of Unemployment Compensation to Women Because of Pregnancy Violates Federal Law.

The first issue raised by the plaintiffs is whether the policies and practices of the South Carolina Employment Security

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[12]To foreclose any possibility that women might be penalized inappropriately in the future, this class description includes imposition of a disqualification from unemployment benefits under either the "voluntary quit" provision or the "misconduct" provision of State law. A penalty based upon a finding that pregnancy-related absence from work constitutes "misconduct" would be as improper as one based on a finding that a woman who had to stop working because of the biological imperatives of pregnancy "voluntarily quit" her job.

[13]Defendants' attempt at trial to relitigate the issue of whether plaintiff Johnson's separation was pregnancy-related cannot be properly considered by this court. The issue was conclusively determined in the administrative proceedings which preceded this litigation. As a matter of state law, the findings of fact of the agency in an unemployment claim are conclusive. *Hyman v. South Carolina Employment Security Commission*, 234 S.C. 369, 108 S.E.2d 554 (1959). Moreover, since defendants failed to dispute plaintiff Johnson's representativeness at an earlier hearing relating to her intervention in this action, they are estopped from raising the issue at this late hour.

While it further appears from the record that plaintiff Brown is also qualified to serve as representative plaintiff, that issue need not be decided here in light of the conclusion stated above.

Commission relating to pregnancy violate federal law. Pursuant to 26 U.S.C. § 3304(a)(12), a state unemployment compensation system must be designed to ensure that

> No person shall be denied compensation under such State Law solely on the basis of pregnancy or termination of pregnancy.

When Congress adopted 26 U.S.C. § 3304(a)(12), it imposed a sweeping ban on withholding unemployment compensation from women job seekers because they were pregnant when they left their most recent work. That a broad prohibition was intended can be readily seen if the statute is viewed in its proper historical context.

In evaluating historical context, it is important to recognize that the unemployment compensation system has undergone constant growth and development over the years.

The early history of federal involvement in unemployment compensation was detailed by the United States Supreme Court in *California Department of Human Resources v. Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971). When originally adopted, the unemployment insurance program was designed

> to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment . . ." Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for "security during the period following unemployment" was thought to be a means of assisting a worker find substantial equivalent employment. The Federal Relief Administrator testified that the Act "covers a great many thousands of people who are thrown out of work suddenly. It is essential

that they be permitted to look for a job. They should not be doing anything else but looking for a job . . . ."

Id. 131, 132, 91 S.Ct. 1354 (footnotes omitted)

In addition, the system was intended to stabilize industry in times of economic decline. As the then Secretary of Labor told Congress:

> I think that the importance of providing purchasing power for these people, even though temporarily, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment insurance benefits in the hands of people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases, you will keep other industries from going downward, and immediately you spread work by that very device."

Id. at 132, 91 S.Ct. at 1354.

Since enactment of the first unemployment compensation program, there have been enormous changes in the American economy and work force. To keep pace with these changes, Congress has necessarily adjusted the system periodically. Only through constant legislative adjustment in a changing economy can the system function and fulfill congressional objectives. Examples of these adjustments can be seen, for instance, in the post-Korean War provision of unemployment compensation for ex-servicemen (5 U.S.C. § 8521, *et seq.*); in provision of benefits to government employees (5 U.S.C. § 8501, *et. seq.*); in provision of insured status to employees of certain non-profit organizations, state hospitals and institutions of higher education (26 U.S.C. § 3309(a)(1)(A) and (B)); and, during the periods of high and prolonged unemployment of the late 1960's and early 1970's, in passage of the Federal-State Extended Unemployment Compensation Act of 1970 and its subsequent amendments (26 U.S.C. § 3304, Note).

As increasing numbers of ex-servicemen entered the job market, as government employment grew even larger but less secure, as non-profit organizations proliferated and as general unemployment grew, Congress took affirmative steps to make sure that otherwise employable individuals did not fall out of the mainstream of American economic life. It took these steps so that newly unemployed workers could avoid "turning to welfare or private charity" and thereby become members of a subterranean economy. *Id.* 132, 91 S.Ct. 1354. It did so because it recognized that it "is essential that they be permitted to look for a job." *Id.*

In recent years, increasing numbers of women — particularly in the past decade — have entered the labor force. Recognition of this change in the composition of the work force has prompted congressional inquiry into the status of women workers and an examination of ways in which their participation in that arena can be encouraged.[14]

One obvious obstruction to women seeking equal partnership in economic life is that arising out of their unique biological role as childbearer. Indeed, even a cursory reading of the administrative decisions introduced into evidence in this case illustrates the premise that the process of bringing children into the world creates special problems for women who seek to have an economic role as well as a maternal one.

Congressional inquiry into the status of women in the work force was prompted in part by the United States Supreme Court. In *Turner v. Department of Employment Security and Board of Review of the Industrial Commission of Utah*, 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed.2d 181 (1975), the Court addressed one of many problems confronting women workers. Until the *Turner* decision was rendered, many unemployment compensation administrators automatically presumed that

[14]Congress has acted in other ways to encourage participation of workers in the national economy. The Civil Rights Act of 1964, for example, was designed to remove impediments to full participation in the labor force by minorities and women.

pregnant women could not work. Based upon that presumption, pregnant women were routinely held to be ineligible to receive unemployment benefits. The U.S. Supreme Court abruptly halted this practice in *Turner*.

So far as it went, the *Turner* case was a positive step in removing barriers to the participation of women in the labor market. But the decision left important problems unresolved.

It is an inevitable part of pregnancy that there are physiological and biological changes in the expectant mother. It is also an inevitable part of pregnancy that the health and safety of the life growing within the woman can be affected by the external environment. Additionally, in our culture, it is an inevitable part of pregnancy that a woman must take time off from work to have a child. The biological imperatives of pregnancy, therefore, require women to seek a hiatus from participation in the work force. The time at which this hiatus is sought will, quite naturally, vary from individual to individual depending upon the circumstances. Some employers try to accommodate these needs and provide maternity leaves. Unfortunately, this accommodation is not universal. In cases where the employer makes no accommodation, another inevitability enters the picture. There is a termination of employment and attendant loss of income when the woman joins the ranks of the unemployed. When a woman returns to the job market after having a child, she and her family can suffer real economic hardship if her employer does not re-hire her and she cannot collect unemployment compensation. The *Turner* decision did not settle the question of whether women faced with these circumstances could be denied unemployment compensation.

It was in this historical context and faced with this unanswered question that Congress passed 26 U.S.C. § 3304(a)(12). Relying upon its power to impose "fundamental standards" on all unemployment insurance programs, Congress prohibited *denial* of benefits to women because of pregnancy

or its termination. The primary issue to be decided by this court is whether Congress in its wisdom answered the question that *Turner* did not address. Because this statute imposes a "fundamental standard," appropriate deference must be given by this court to insure that its full sweep and scope are achieved.[15]

By choosing to impose a "fundamental standard" upon the States, Congress obviously believed that it was addressing a problem of major proportions, significantly affecting large numbers of women in the work force. The device it used and the words it selected make this conclusion inescapable. It said, in imposing a "fundamental standard," that:

> No person shall be denied [unemployment] compensation . . . solely on the basis of pregnancy or termination of pregnancy.

In plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for *denying* benefits to otherwise eligible women. These plain words must necessarily be construed to convey their ordinary meaning. *State of Maine, et al. v. Thiboutot, et vir., etc.*, ___ U.S. ___, 100 S.Ct. 2502, 65 L.Ed.2d 555; *Dobbs v. Train*, 409 F.Supp. 432 (D.Ga.1975), *aff'd*, 559 F.2d 946 (5th Cir. 1977); *Federal Ins. Co. v. Speight*, 220 F.Supp. 90 (E.D.S.C.1963). If Congress intended a more limited prohibition or carved out exceptions, it would not have imposed a "fundamental standard" using such broad and sweeping language. It would have relied upon much more specific

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[15]Precedent exists for reading "fundamental standards" in the context of unemployment insurance broadly. In *California Department of Human Resources v. Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971), judicial inquiry was made into the meaning of the mandate that each unemployment system must be designed to insure full payment of benefits "when due." In that case, the U. S. Supreme Court specifically rejected a narrow interpretation of the "when due" standard because narrow construction would frustrate the congressional objective of guaranteeing early replacement of lost wages.

language and used appropriately restrictive expressions.[16] *In re Nissen's Estate*, 345 F.2d 230 (4th Cir. 1965). The language it did use, however, obviously left no room for exceptions. It does not permit denial of benefits, as in South Carolina, solely because (1) a woman, for pregnancy-related medical reasons, voluntarily left work to have a child rather than wait for her employer to fire her, (2) a woman was refused a maternity leave or her leave had no fixed terminal date, or (3) a woman attempted to return to her job either before or after her maternity leave was scheduled to expire. The plain and unambiguous words of the enactment do not contemplate consideration of such irrelevant factors.[17]

The foregoing conclusion is supported by an additional consideration. Congress would not have expended any effort in this area unless it thought it necessary to remedy a problem.[18] The statute being examined by this court is remedial in nature and must, therefore, be broadly construed to reach the problem it sought to end. *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967); *Wirtz v. Ti Ti*

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[16]Appropriate words, for instance, to restrict the scope of the statute would have been "no person shall be found unable to work because of pregnancy or termination of pregnancy."

[17]The statute at issue here is unambiguous on its face. Therefore, there is no real need to consider its legislative history. It is significant to note, however, that that history supports the conclusion stated above. In the Final Report of the House Ways and Means Committee which considered the bill, its authors indicated that the statute was proposed to outlaw state statutes viewed to be "inequitable" because they "deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work." These eligibility factors, the authors believed, "make discriminatory disqualificatio, because of pregnancy unnecessary." H.R.Rep.No.94-755, 94th Cong., 1st Sess., p. 50 (1975).

[18]Defendants have argued that 26 U.S.C. § 3304(a)(12) simply bans the states from presuming that pregnant women cannot work. This reading of the statute is inappropriate. It reduces the law to a simple codification of the *Turner* decision. Read so narrowly, the law has no independent force or effect. Congress should not, however, be presumed to have adopted useless or unnecessary legislation. *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977); *Knapczyk v. Ribicoff*, 201 F.Supp. 283 (D.Ill. 1962).

Peat Humus Company, 373 F.2d 209 (4th Cir. 1967), *cert. denied*, 389 U.S. 834, 88 S.Ct. 37, 19 L.Ed.2d 94.

The problem addressed by the statute under scrutiny was that the period of unemployment (and attendant wage loss), which necessarily accompanies pregnancy, can serve to force otherwise employable women out of the job market. Like all other unemployed workers, women who have stopped working to have a child can readily remain effective participants in the economy only if assistance is provided to encourage their return to work when they are physically able to do so. By providing partial wage replacement for pregnancy-related periods of actual unemployment,[19] Congress sought to facilitate the process of seeking reemployment. Absent some assistance, many women would be hampered in their effort to rejoin the work force. Absent, for example, some income to pay for child care expenses while looking for work, a woman cannot effectively compete in the employment process with others. If the statute is to fulfill the remedial purpose of

[19]Congress has also acted to provide partial wage replacement for the period when a woman cannot work because of pregnancy. In an amendment to 42 U.S.C. § 2000(e), Congress has mandated that women not be excluded from receipt of disability insurance because they are unable to work due to pregnancy. This change in the Civil Rights Act assists women over an additional economic hurdle obstructing their participation in the marketplace. Like 26 U.S.C. § 3304(a)(12), the amendment forecloses the possibility that women would have to choose between a role as wage earner or a role as mother. Taken together, these two statutes implicitly preclude the possibility that harsh economic realities which would otherwise attend pregnancy will interfere with the right of working women freely to choose whether or not to have a child. *Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The fact that the language of 26 U.S.C. § 3304(a)(12) is coextensive with this fundamental constitutional right (reaching "pregnancy" and "termination of pregnancy") supports this conclusion.

In reaching this conclusion, this court is mindful of another historical and jurisprudential fact. In recent years, courts and Congress have expressly recognized that the issues involved in the process of bringing life into the world are of fundamental importance and require special consideration. For example, there has been recent recognition of the legitimacy of Congress' desire to promote and protect the role of women as mother as well as wage earner. *E.g., Harris v. McCrea*, ___ U.S. ___, ___, 100 S.Ct. 2671, 2690-92, 65 L.Ed.2d 784.

encouraging a woman's search for a suitable job after having a child, it must be read to forbid the policies and practices complained of in this case. For it was those very policies which were used to deny plaintiffs the partial wage replacement that would have facilitated their job hunting efforts.

Defendants have urged this court to adopt a narrow view of the statute under examination and to sanction their practice of penalizing women because of pregnancy. They, of course, present various arguments in support of their views.[20] None of these arguments satisfactorily answers the question of why some women who have had a child should receive benefits while other women similarly situated should not.[21] The decision of when to stop working because of pregnancy necessarily will turn in each individual case on the facts and circumstances surrounding that particular pregnancy. Whether departure from work is prompted by environmental or health hazards on the job, complications arising out of pregnancy or the biological imperatives of childbirth, the decision to stop

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[20]During the course of this litigation, the U.S. Department of Labor has been silent regarding its position on the issues before the court. At trial, however, defendants produced a copy of a letter from the Labor Department dated July 9, 1980. The location of the original letter is unknown. The copy of the letter set forth the conclusion that the challenged policies of the South Carolina Employment Security Commission are consistent with the Labor Department's understanding of 26 U.S.C. § 3304(a)(12). While due deference is generally given to agency opinions by courts (*Skidmore v. Swift Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944), in this case we find the evidence of the agency's view unpersuasive. It does not discuss the policies or issues involved in this litigation and cites no cases to support its conclusions. It also discusses concerns of the Labor Department clearly not at issue in this case; for example, the prospect that benefits would be paid to women who are not able to work should the plaintiffs prevail. As the foregoing discussion reveals, this latter concern is an unreal one. Finally, no evidence was introduced indicating what information had been given to the Labor Department by defendants which led the agency to reach the conclusion it expressed in its letter.

[21]Plaintiffs have argued that this disparate treatment of otherwise identically situated women violates the Equal Protection Clause of the Forteenth Amendment. Because this court finds for plaintiffs on statutory grounds and because, for equitable and practical reasons, retroactive relief is to be limited to the effective date of the statute (making independent relief on constitutional grounds unavailable), this court finds it unnecessary to reach this and plaintiffs' other constitutional claims.

working must be left to the woman and her physician in each case. That medical decision must be respected. Whether the woman receives unemployment compensation when she can return to work cannot and should not turn, as in South Carolina, on the whim or calculations of the employer.

In conclusion, an analysis of the historical context of unemployment compensation and the passage of 26 U.S.C. § 3304(a)(12) supports plaintiffs' contention that the remedial legislation at issue in this case was intended to and plainly did address an issue inevitably touching a major part of the American work force. As part of the process of bringing women into full partnership in American economic life, Congress continues a trend which began with passage of the first unemployment compensation law and which is ongoing. It has and continues to adjust the law to match the present day realities of our economy.

Based on the foregoing, it is the finding of this court that the policies and practices of the South Carolina Employment Security Commission which disqualify otherwise eligible women from receipt of unemployment compensation because of pregnancy are in direct contravention of 26 U.S.C. § 3304(a)(12). Accordingly, those policies and practices must be enjoined. Additionally, the class of plaintiffs are entitled to relief prospectively and, to the extent practicable, retrospectively. Because this court recognizes that (1) the cost of locating many class members disqualified prior to the effective date of 26 U.S.C. § 3304(a)(12) may be difficult, and (2) the amount of any individual claim is relatively small, granting retroactive relief to those disqualified prior to January 1, 1978, would be so cost ineffective as to be inequitable. Accordingly, retrospective relief is limited to those otherwise eligible applicants disqualified from receipt of unemployment compensation because of pregnancy since January 1, 1978. Further, it is the view of this court that the named plaintiffs in this action and other class members to be identified by name during the course of this litigation are specifically entitled to retrospective relief.

ORDER

In accordance with the preceding rationale, and to remedy the violations of law occasioned by the policies and practices of the South Carolina Employment Security Commission complained of in this action, it is hereby

ORDERED, ADJUDGED AND DECREED, that:

Prospective Relief

(1) The policies and practices of the South Carolina Employment Security Commission are declared to be in direct contravention of 26 U.S.C. § 3304(a)(12);[22]

(2) That the defendants and the South Carolina Employment Security Commission are permanently enjoined from formulation or implementation of any policy or engaging in any practice which disqualifies otherwise eligible women from receipt of unemployment compensation pursuant to S.C. Code Ann. § 41-35-120(1) or (2) because those women left their most recent work for pregnancy-related medical reasons.

(3) That the defendants and the South Carolina Employment Security Commission are ordered to make appropriate changes in their various regulations, manuals, notices, policy statements and other documents, whether used internally or distributed to the public, in a manner not inconsistent with this opinion, and furnish a copy of all such revised instruments to counsel for plaintiffs within thirty (30) days of the date of this order.

(4) That the defendants and the South Carolina Employment Security Commission are ordered to furnish unto counsel for the plaintiffs copies of all decisions, including those of claims adjudicators, appeals referees or commissioners of the

[22]As previously noted, because no independent relief is available and because plaintiffs have prevailed on the merits of their statutory claim, this court does not reach the constitutional issues pressed by plaintiffs.

South Carolina Employment Security Commission, regarding women who were pregnant when they left their most recent work for a period of one (1) year following the date of this order;

(5) That the defendants and the South Carolina Employment Security Commission are ordered to post notices in each of their several offices throughout the State of South Carolina informing the public of this litigation and its outcome. The content of this notice is to be agreed upon by counsel for the respective parties within thirty (30) days of the date of this order;

(6) That the defendants and the South Carolina Employment Security Commission are ordered to amend the document now characterized as UCB-236 to make an affirmative statement that leaving one's most recent work due to pregnancy-related medical problems *is* good cause for voluntarily quitting an employment within the meaning of the South Carolina Employment Security law. Counsel for the respective parties shall agree upon the content of said affirmative statement within thirty (30) days of the date of this order.

Retrospective Relief

(1) The South Carolina Employment Security Commission shall pay unto the named plaintiffs and class members whose identities became known at trial an amount equal to the sum of the weekly benefit amount to which each was entitled times the number of weeks each was employed and eligible for benefits, minus a credit for any such amount already paid.

(2) The defendants and the South Carolina Employment Security Commission shall identify to counsel for plaintiffs within ninety (90) days of the date of this order all women who were pregnant when they left their most recent work, but whose applications for unemployment compensation were denied since January 1, 1978. Counsel for plaintiffs shall have

access to the records of the Employment Security Commission regarding all those so identified.

(3) Within one hundred and twenty (120) days of the date of this order, counsel for the respective parties shall agree upon a listing of those persons identified pursuant to the preceding paragraph as to which ones shall be mailed written notice. Within thirty (30) days thereafter, those persons who are to receive notice shall be mailed, by first class mail, notice of this litigation and its outcome and of the individual's presumptive right to receive retroactive unemployment compensation benefits. Names and addresses of persons receiving such notices shall be mailed by first class mail to counsel for the plaintiffs. The content and form of said notice shall be agreed upon between counsel for the respective parties within thirty (30) days of the date of this order;

(4) The South Carolina Employment Security Commission shall pay to all those who respond to the aforedescribed notice within ninety (90) days of its mailing an amount equal to the sum of the weekly benefit amount to which each individual was entitled multiplied by the total number of weeks each was unemployed and eligible for benefits, minus a credit for any such amounts already paid to any individual. Such payments shall be made within thirty (30) days after receipt of a notice of claim from an individual.

(5) Defendants shall give notice to counsel for plaintiffs of any claim or a class member it seeks to contest. Notice is to be served on the individual class member and counsel for plaintiffs within one hundred and twenty (120) days of preparation of the list of potential class members set forth in paragraph number (2) of the Retrospective Relief section of this order. In the event there are any such challenges, individual hearings before a special master, to be appointed by this court, will be convened within sixty (60) days of receipt by the court of a notice or letter from such class member indicating a desire to contest the decision of the defendants or

the South Carolina Employment Security Commission. As the contesting party, defendants will bear the burden of proving that the claimant is entitled to a lesser amount of benefits than otherwise presumptively due.

Attorneys Fees

Plaintiffs, as prevailing parties, are entitled to recover their costs and reasonable attorneys fees. 42 U.S.C. § 1988. Plaintiffs are instructed to file their request for a specific amount, together with supporting affidavits and memoranda, within thirty (30) days from the date of this order. Defendants shall have thirty (30) days after service thereof within which to respond.

Plaintiffs are further entitled to additional attorneys fees for work performed in implementing this order, including matters relating to retrospective relief, and may apply to this court for payment of such additional fees at an appropriate time in the future.

Time Limits

Any time limits established by this order can be extended or enlarged on application to this court and upon good cause shown or by consent of counsel for the respective parties.

APPENDIX D

In The United States District Court For The District of South Carolina, Charleston Division.

Civil Action 79-561

MARY E. BROWN, etc.,

Plaintiffs,

vs.

FRANCES E. PORCHER, et al.,

Defendants,

LIBERIA JOHNSON,

Applicant for Intervention.

ORDER

Defendants have moved this Court for Summary Judgment on the grounds, *inter alia,* that Plaintiffs' claim for retroactive benefits in the captioned case is barred by the eleventh amendment to the United States Constitution. Oral argument on this motion was heard on November 20, 1979.

Edelman v. Jordan, 414 U.S. 651 (1974) recognized that suits for monetary relief to be paid out of a State's treasury are barred by the eleventh amendment. Defendants point to *Edelman* as a barrier to recovery of retroactive benefits by Plaintiffs in this action. They argue that the South Carolina Employment Security Commission is the "alter ego" of the State of South Carolina and, as such, is immune from a suit seeking retroactive benefits. Defendants' reliance on Edelman is misplaced.

This precise question was presented in *Bowen v. Hackett,* 387 F. Supp 1212 (D.R.I. 1975). In a decision that carefully considered *Edelman,* the U.S. District Court in *Bowen* found that the nature and source of unemployment compensation funds administered by the Rhode Island Department of Employment Security were sufficiently independent from the sovereign that the eleventh amendment did not bar the recovery sought by the Plaintiff in that case. The two factors of overriding significance, according to the Court in *Bowen,* were that

> "[1] a judgment of retroactive benefits would be satisfied from separate funds which are independent from the state's general revenues and [2] that the state has specifically immunized itself from responsibility for benefit payments."

Bowen v. Hackett, supra at 1212, n. 13. Other cases in which the eleventh amendment has arisen in the context of unemployment compensation are substantially in accord. See *New York Telephone Co. v. NY State Department of Labor,* 434 F. Supp 819, 824 (1977), rev'd on other grounds, 566 F. 2d 388 (1978), affirmed ___ U.S. ___, 59 L.Ed 2d 533 (1979) *Bigelow, et. al. v. MESC,* (CCH) UNEMPLOY. INS. REPTS, para. 21,520 (E.D. Mich, May 15, 1978); *Black v. Caldwell,* (CCH) UNEMPLOY. INS. REPTS, para. 21,485 (N.D.Ga., Jan. 6, 1979). These cases are consistent with a clear line of judicial authority holding that if a legislature has intentionally insulated the state treasury from the liability of a legislatively created instrumentality, that instrumentality does not constitute an "alter ego" of the State. Recovery against such an instrumentality is not barred by the eleventh amendment. *Matherson v. Long Island State Park Commission,* 442 F. 2d 566 (2d Cir 1971); *Urbano v. Board of Managers of New Jersey State Prison,* 415 F.2d 247 (3d Cir 1969), cert. denied 397 U.S. 948 (1970); *Harrison Construction Co. v. Ohio Turnpike Commission,* 272 F.2d 337 (6th Cir, 1959).

In the instant case, as in *Bowen v. Hackett* and other unemployment compensation cases, the two essential factors are met. First, the fund from which unemployment benefits are paid is "independent from the state's general revenues." By statute, South Carolina's unemployment fund is ". . . a special fund . . . administered separate and apart from all public monies or funds of the state." S.C. Code § 41-33-10. It is composed of contributions from employers (including interest and earnings on those contributions) for the payment of unemployment benefits. S.C. Code § 41-33-10, *et. seq.*[1] Second, "the state has specifically immunized itself from responsibility for benefit payment." Pursuant to statute, unemployment compensation in South Carolina is due and payable only

> ". . . to the extent that monies are available therefor to the credit of the unemployment compensation fund and neither the state nor the Commission [is] liable for any amount in excess of such sums.
>
> S.C. Code 41-27-630.

Because there are no state treasury funds involved in the payment of unemployment compensation benefits and the State has specifically immunized itself from responsibility for benefit payment, the eleventh amendment does not bar recovery of retroactive benefits against the unemployment compensation fund administered by the Defendants.

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[1]The fund can also include money received from the Federal Government paid as reimbursement pursuant to the Federal-State Extended Compensaion Act of 1970. Additionally, even the administration of the program is paid for by the Federal Government pursuant to 41 USC 501 et. seq. and 26 USC 3301 et. seq.

BASED ON THE FOREGOING, it is hereby Ordered that the Defendants' Motion for Summary Judgment, insofar as it seeks to interpose the eleventh amendment to the United States Constitution as a barrier to recovery by the Plaintiffs, is DENIED.

SO ORDERED.

FALCON B. HAWKINS,
JUDGE, United States District Court

Charleston, South Carolina
February 13th, 1980

ENTERED
2-13-80

Opposition

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANCES E. PORCHER, in her official capacity as Claims Adjudicator of the South Carolina Employment Security Commission; H. C. SLOAN, in his official capacity as Appeals Referee of the South Carolina Employment Security Commission; C. LEM HARPER, in his official capacity as Chairman of the South Carolina Employment Security Commission; CECIL SANDIFER, in his official capacity as Vice Chairman of the South Carolina Employment Security Commission; and FRANK E. BALDWIN, JR., in his official capacity as Commissioner of the South Carolina Employment Security Commission,

Petitioners,

v.

MARY E. BROWN, on behalf of herself and all others similarly situated, and LIBERIA JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the decision of the District Court (which was unanimously affirmed by the Fourth Circuit Court of Appeals) that petitioners' denial of unemployment insurance to women solely due to pregnancy was in violation of 26 U.S.C. § 3304(a)(12)?

2. Did the Eleventh Amendment to the United States Constitution bar the District Court from awarding unemployment insurance payments wrongly withheld in the past when those payments came from a trust fund consisting of money collected from employers and kept in the U.S. Treasury completely separate and apart from the State Treasury?

3. Is there any basis for extinguishing the private right of action in unemployment insurance cases recognized by this Court in *California Department of Human Resources v. Java* and succeeding cases and ratified by subsequent passage of § 3304(a)(12) and numerous other amendments to unemployment insurance laws by Congress?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
COUNTER STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	12
APPENDIX	1a

AUTHORITIES

CASES: Page

Bowen v. Hackett, 387 F.Supp. 1212 (D.R.I. 1975) 8
Burtton v. Johnson, 538 F.2d 765 (7th Cir. 1976) .. 9
California Department of Human Resources v. Java, 402 U.S. 121 (1971) 3, 9, 10
Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) 9
Chevron Oil v. Huson, 404 U.S. 97 (1971) 8
Edelman v. Jordan, 415 U.S. 651 (1974) 8
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 8
Fusari v. Steinberg, 419 U.S. 379 (1975) 9, 10
Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944) 8
Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946) 8
Indiana Employment Security Board v. U.A.W., 444 U.S. 951 (1979) 7
Maine v. Thiboutot, 448 U.S. 1 (1980) 10, 11
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, —— U.S. ——, 50 U.S.L.W. 4457 (1982) 9, 10
Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, (1981) .. 10, 11
Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, (1981) 10, 11
Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979) 9
Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972) .. 8
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 6
St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) 6
Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 3
Turner v. Department of Employment Security, 423 U.S. 44 (1975) 4, 5, 6

UNITED STATES CONSTITUTION:

Eleventh Amendment 7, 8

AUTHORITIES—Continued

Page

UNITED STATES CODE:

26 U.S.C. § 3301 3
26 U.S.C. § 3304(a) ..... *passim*
42 U.S.C. § 501 3
42 U.S.C. § 502 10
42 U.S.C. § 503(a) 7, 10, 11
42 U.S.C. § 503(b) 10, 11
42 U.S.C. § 602 ..... 10, 11
42 U.S.C. § 604(a) 10
42 U.S.C. § 1103 7
42 U.S.C. § 1104 7
42 U.S.C. § 1983 ..... 10, 11

CODE OF LAWS OF SOUTH CAROLINA:

§ 41-27-630 ..... 7, 8
§ 41-33-10 ..... 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1972

FRANCES E. PORCHER, in her official capacity as Claims Adjudicator of the South Carolina Employment Security Commission; H. C. SLOAN, in his official capacity as Appeals Referee of the South Carolina Employment Security Commission; C. LEM HARPER, in his official capacity as Chairman of the South Carolina Employment Security Commission; CECIL SANDIFER, in his official capacity as Vice Chairman of the South Carolina Employment Security Commission; and FRANK E. BALDWIN, JR., in his official capacity as Commissioner of the South Carolina Employment Security Commission,

Petitioners,

v.

MARY E. BROWN, on behalf of herself and all others similarly situated, and LIBERIA JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO CERTIORARI

COUNTER STATEMENT OF THE CASE

This action challenges petitioners' policy of penalizing women because of pregnancy. Prior to this litigation, petitioners reasoned that women compelled by pregnancy to stop working temporarily had "voluntarily quit" their jobs "without good cause." *Brown v. Porcher*, 502 F. Supp. 946 at 950-952 (D.S.C. 1980). Based on this logic, petitioners routinely denied unemployment insurance payments to women who were not reinstated by their employers and, as a result, were actively seeking work after giving birth.[1] In all instances touched upon by this case, those women were otherwise eligible to receive the payments in question.

After carefully reviewing petitioners' policy, the District Court concluded it conflicted with 26 U.S.C. § 3304 (a)(12). That statute provides that "no person shall be denied [unemployment] compensation under . . . State law solely on the basis of pregnancy or termination of pregnancy." 502 F.Supp. at 957. The Fourth Circuit unanimously affirmed that judgment. *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981). In denying petitioners' request for rehearing, no judge requested a poll on the suggestion that the case be reviewed *en banc*. (Petitioners' Appendix p. 17.) During this process, every issue now raised by the petitioners was carefully considered by the lower Courts. To date, not one of the numerous federal judges who have scrutinized petitioners' assorted contentions has expressed any support for them. There is no indication of a need for additional review of those contentions by this Court either in the record below or in the instant Petition.

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[1] In a relatively few instances, this case also deals with women who are looking for work while still pregnant. 502 F.Supp. at 947, n. 1.

REASONS FOR DENYING CERTIORARI

I.

THE LOWER COURTS PROPERLY FOUND THAT PETITIONERS' DENIAL OF UNEMPLOYMENT INSURANCE PAYMENTS TO WOMEN SOLELY DUE TO PREGNANCY VIOLATED 26 U.S.C. § 3304(a)(12).

In 1976, Congress enacted Public Law 94-566 after a comprehensive review of the unemployment insurance system. One of the provisions of that enactment is now codified at 26 U.S.C. § 3304(a)(12). It reads, in relevant part, that "no person shall be denied [unemployment] compensation under . . . State law solely on the basis of pregnacy or termination of pregnancy." Congress included this provision among a limited number of "fundamental standards" serving as a precondition to receipt of substantial federal operating grants by unemployment insurers.[2] Those "fundamental standards" are set out in the Social Security Act, 42 U.S.C. § 501, *et. seq.* and the Federal Unemployment Tax Act, 26 U.S.C. § 3301, *et seq.* They serve to effectuate the Congressional purpose of giving "prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief'." *California Department of Human Resources v. Java*, 402 U.S. 121, 131 (1971) (Burger, C.J.). *See also Steward Machine Co. v. Davis*, 301 U.S. 548, 594 (1937).

From the outset of this litigation, the substantive issue has been whether petitioners had violated the mandate of 26 U.S.C. § 3304(a)(12). This issue was carefully canvassed by the District Court. That Court found that

---

[2] In recent years, the unemployment insurance program operated by the petitioners has received about $25 million annually for administration from the federal government. See 502 F.Supp. at 952.

petitioners were routinely denying unemployment insurance payments to women who were able to work, available for work and looking for a job *solely* because those women had previously been forced to stop working to give birth to a child. In each instance touched upon by this case, the *sole* reason the women had left their prior jobs was pregnancy. In each instance, the *sole* reason they were denied unemployment insurance was pregnancy. The District Court, therefore, concluded that petitioners' actions in denying payments violated a clear federal mandate that "no person shall be denied [unemployment] compensation . . . solely on the basis of pregnancy or termination of pregnancy." 26 U.S.C. § 3304(a)(12). The Fourth Circuit unanimously affirmed this holding. 660 F.2d 1001. The case was again subjected to judicial scrutiny when petitioners sought rehearing and suggested the matter be reheard *en banc*. No judge on the Fourth Circuit requested a poll on the suggestion for rehearing *en banc*.

Despite the thorough and exhaustive review of the substantive issue below, petitioners again assert that they can disqualify women job-seekers from receiving unemployment insurance payments if those women previously stopped working to have a baby. In support of their view, petitioners contend (1) that Congress never intended to legislate in the field of unemployment insurance "disqualifiers"; (2) that the scope of Subsection (a)(12) is limited by this Court's decision in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); and (3) that the lower Courts erred in rejecting the opinion of a Labor Department functionary on the issue to be decided by the Court. All three propositions lack merit.

Petitioners first proposition—that Congress never intended to legislate in the field of unemployment insurance "disqualifiers"—is rebutted by the actions of Congress. Public Law 94-566 is not the only Congressional

prohibition of this type. Title 26 U.S.C. § 3304(a) contains three other provisions limiting grounds for disqualification from payment of unemployment insurance. Subsection (5) prohibited disqualification of persons refusing to work in anti-union shops or substandard places of employment. Subsection (8) banned disqualification of persons participating in approved job training programs. Subsection (9) prohibited disqualification due to state of residence or application. Conversely, Congress has also imposed mandatory disqualifications in certain instances: of teachers during summer recess [(a)(6)]; of professional athletes during their off-season [(a)(13]; and of foreign nationals lacking work permits [(a)(14)]. Clearly, Congress has prohibited some "disqualifiers" and required others. Petitioners' contention notwithstanding, Congress has often legislated in this field. In Subsection (a)(12), it prohibited the kinds of disqualifications petitioners routinely imposed on women job-seekers who previously had to stop wroking "solely due to pregnancy or termination of pregnancy."

Petitioners' second argument is that the statute was meant only to codify this Court's decision in *Turner* barring presumptions of inability to work because of pregnancy. In light of the remedial nature of the legislation and the broad, unambiguous language of the enactment, both Courts rejected this interpretation. 660 F.2d at 1004; 502 F.Supp. at 954-957. In attempted rebuttal, petitioners cite to fragments of the legislative history to reargue this point. However, "nothing in the scant legislative history indicates that Congress intended the statute to be read other than literally." 660 F.2d at 1004. The excerpts of the legislative history cited in the instant petition do not support the notion that *Turner* was intended to define the scope of § 3304(a)(12). They suggest only that *Turner* helped stimulate passage of the law—a conclusion that the District Court reached when

analyzing this issue.[3] 502 F.Supp. at 954-955. Given the exhaustive treatment this question has already received, the instant petition raises no novel question for review by this Court.

Petitioners' third argument concerns the lower Courts' treatment of a letter from the Labor Department petitioners had "solicited during the course of this litigation." 660 F.2d at 1004. That letter purported to support petitioners' interpretation of the subject statute. The lower Courts found it to be unpersuasive. They did so after carefully reviewing its contents in light of prior opinions of this Court. They considered "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements. . . ." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783 n. 12 (1981) citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See 660 F.2d at 1004-1005 citing *St. Martin* and 502 F.Supp. at 527, n. 20 citing *Skidmore*. (The District Court's opinion predated *St. Martin* by approximately 6 months.) There is nothing new, novel or incorrect in the analysis of the lower Courts requiring corrective action by this Court.

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[3] The bill containing the present language of 26 U.S.C. § 3304(a)(12) (HR 10210) was introduced in October, 1975, a month before this Court's decision in *Turner*. It seems unlikely, therefore, that it was intended as a simple codification of a Supreme Court decision that was non-existent at the time of its introduction. Given the law was to become effective in 1978 (660 F.2d 1005), it is also unlikely that Congress sought to stay enforcement of the *Turner* decision for over a year after it was handed down.

II.

THE ELEVENTH AMENDMENT DOES NOT BAR EQUITABLE RESTITUTION FROM A SPECIAL UNEMPLOYMENT INSURANCE TRUST FUND WHICH IS NOT PART OF THE GENERAL REVENUES OF THE STATE.

The lower Courts have ordered that equitable restitution be made in this case to women wrongly denied unemployment insurance payments because of pregnancy between January 1, 1978 (the effective date of 26 U.S.C. § 3304(a)(12)) and the date of the District Court's Order. Petitioners argue this restitution is barred by the Eleventh Amendment. It is not.

The issue of whether restitution from an unemployment insurance trust fund is barred by the Eleventh Amendment is not new to this Court. It was the first question presented in a Petition for Writ of Certiorari in *Indiana Employment Security Board v. U.A.W.*, 444 U.S. 951 (1979). This Court did not grant certiorari.

In the instant case, the unemployment insurance trust fund from which restitution is to be made is administered in the same way as that in Indiana and every other state. It is not part of the State Treasury. It is a special insurance trust fund which is always maintained "separate and apart from all public moneys or funds of the State." Code of Laws of South Carolina § 41-33-10. It is composed of money collected from employers by the petitioners which is promptly remitted to the United States Treasury and held for use solely for unemployment insurance. 42 U.S.C. §§ 503(a)(4), 1103, 1104. *It is thus not even in the hands of the State.*

Moreover, by law, "neither the State nor the Commission shall be liable for any amount in excess of such sums" already on deposit with the federal government in the unemployment trust fund. Code of Laws of South Carolina § 41-27-630. The State treasury, therefore, is

completely insulated from payment of *any* claims against the fund, including those involved in making restitution to the respondents.

Given the foregoing, the lower Courts correctly recognized that respondents have laid no claim to tax money in the state treasury of South Carolina; that this is not a suit "by private parties seeking to impose a liability which must be paid from public funds in the State Treasury. . . ." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 459-460 (1976) (Stevens, J., concurring); *Bowen v. Hackett*, 387 F.Supp. 1212, 1218 (D.R.I. 1975).[4] 660 F.2d 1006-1007. The Eleventh Amendment, therefore, is no bar to restitution in this action and the case raises no new substantive issue for review by this Court.[5]

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[4] The cases relied upon by the petitioners (Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946) and Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944)) involve distinctly different considerations. In those cases, taxpayers sought to recover state taxes they had paid under protest. Under ordinary circumstances, those taxes were payable into the general revenues of the State. Because litigation to recover them was commenced, the money was deposited in escrow pending the outcome of the lawsuits. In one of those cases (Kennecott), the State Treasury could be held liable for amounts in excess of the taxes in escrow (costs and interest). See 327 U.S. at 576, n. 2. In this case, funds are especially earmarked for deposit in a special fund for a special purpose. That fund is always maintained "separate and apart from all public moneys or funds of the State" and "neither the State nor the Commission [is] liable for any amount in excess of such sums." Code of Laws of South Carolina § 41-33-10 and § 41-27-630.

[5] Petitioners also argue that the "doctrine of nonretroactivity" bars restitution here, citing Chevron Oil v. Huson, 404 U.S. 97 (1971). The Court of Appeals correctly noted that *Chevron* has nothing to do with remedies, however. 660 F.2d 1005, n. 6. In reviewing the propriety of the equitable relief the District Court awarded, the Fourth Circuit properly relied upon and applied the test of remedies set down in Rothstein v. Wyman, 467 F.2d 226, 234 (2d Cir. 1972). In doing so, it weighed criteria similar to those in *Chevron*, but formulated in a manner more appropriate for

III.

THERE IS NO REASON TO EXTINGUISH THE PRIVATE RIGHT OF ACTION TO ENFORCE CONGRESSIONALLY MANDATED "FUNDAMENTAL STANDARDS" FOR UNEMPLOYMENT INSURANCE.

Petitioners' final argument is that the "fundamental standards" for unemployment insurance cannot be enforced by private litigants. In making this assertion, petitioners neither cite nor analyze *this* Court's unanimous decision in *California Department of Human Resources v. Java*, *supra*, even though *Java* was relied upon below in disposing of this question. 502 F.Supp. 947, n. 2. *See also*, 660 F.2d at 1005.

In *Java*, *this* Court enforced another of the "fundamental standards" for unemployment insurance in an action by private litigants. In the decade since *Java*, the case has been cited approvingly and relied upon by this and other federal Courts in entertaining the challenges of private litigants to actions of unemployment insurers. See, for example, *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979); *Burtton v. Johnson*, 538 F.2d 765 (7th Cir. 1976); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973). Also during the intervening years, Congress has amended the unemployment insurance laws on numerous occasions (including the provision involved in this case) and has never questioned *this* Court's recognition of a private right of action. *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran*, —— U.S. ——, 50 U.S.L.W. 4457 at

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evaluating remedies. The Court's analysis of these more appropriate criteria is thorough, cogent and correct. *De novo* review of that analysis is unneecssary.

[6] The question of judicial enforcement of these "fundamental standards" by private litigants was discussed in the briefs in *Java*. See, for example, Appellees' Brief, p. 25.

4464-4465 (1982).[7] See also, *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980).

Arguing a contrary position, petitioners mistakenly rely on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1971). Neither of those cases involve a statute with an history of judicial enforcement like the one at issue here; both address the question of private enforcement under different laws for the first time. Even if this case did not involve a cause of action that had been previously recognized, neither case would be dispositive of the issue.

It has been held that federal statutes are generally enforceable by private individuals through 42 U.S.C. § 1983. *Maine v. Thiboutout, supra.* This case does not involve either exception to that general rule.

First, Congress has never suggested that § 1983 is withdrawn as to federal unemployment insurance. As the foregoing discussion reveals, the contrary is true. This conclusion is supported by an even closer analysis of the question.

Congressional enactments for unemployment insurance are closely analogous to those found to support a private right of action in *Thiboutot.* In both instances, the State plan for assistance must be federally approved. 42 U.S.C. 502, 503; 42 U.S.C. 602(b) and 604(a). Substantive standards for payment of assistance are established by statute in both. 26 U.S.C. 3304(a) and 42 U.S.C. 503; 42 U.S.C. 602(a). States found to be out of compliance with federal law are cut off from federal funding under

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[7] In *Merrill Lynch*, the dissenting Justices expressed concern that the majority had relied on congressional inaction in the face of older *lower* court decisions erroneously upholding private rights of action. See 50 U.S.L.W. at 4468, 4469, 4470, 4472. That concern is not present in this case. *Java* and *Fusari* were both correctly decided by *this* Court.

both laws. 42 U.S.C. 503(b)(1); 42 U.S.C. 604(a)(2). Being substantially identical, it is obvious that both sets of laws are subject to identical judicial enforcement. Congress has taken no action to alter that perception. *Merrill Lynch, supra* at 4464-4465. *Sea Clammers* is not to the contrary. That action expressly relied on the fact that there were two other express provisions for suits by private individuals in the statutes being examined. Their existence obviated the need for a right of action under § 1983. That is not the case here and was not the case in *Thiboutout.*

Second, it is clear that the "fundamental standards" for unemployment insurance create "rights" enforceable under § 1983. In *Thiboutot*, this Court held that plaintiffs' claim to welfare benefits to which they were entitled under the federal Social Security Act stated a private cause of action enforceable through § 1983. The statute in question there did not create a substantive federal right to receive welfare payments, except pursuant to a qualifying state plan. 42 U.S.C. 602(a). Unemployment insurance is also payable under the cooperative federal-state system only with respect to an approved state plan. 42 U.S.C. 503(b). Funding is terminated if either the provisions of 26 U.S.C. 3304(a) or 42 U.S.C. 503(a) are violated. See 42 U.S.C. 503(b)(1), and (b)(2). This Court recognized in *Java*, 402 U.S. at 130, that the objectives of Congress in providing unemployment insurance were closely analogous to the legislative objectives in enacting the traditional "welfare" system involved in *Thiboutot.* It would strain credulity to suggest that federal law creates enforceable rights under the welfare section of the Social Security Act while not creating them under the mirror image provisions for unemployment insurance.[8]

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[8] *Pennhurst* does not support an opposite result. That case involved nebulous substantive requirements and insufficient federal funding to carry them out. Here, the mandate of 26 U.S.C. § 3304(a)(12)

CONCLUSION

Based on the foregoing, respondents respectfully urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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is clear and unambiguous. There is also ample funding to carry out that mandate. Petitioners receive about $25 million per year from the federal government for administration. See n. 1, *supra*. According to their *44th Annual Report*, for 1978-1979, for example, they collected about $110 million from employers and paid approximately $64 million of that to workers. As of June 30, 1979, they had nearly $159 million on account in the unemployment insurance trust fund. These figures drawf the $4 million petitioners have estimated are due in retrospective payments in this case.

APPENDIX

Code of Laws of South Carolina 1976, as amended:

§ 41-33-10. Creation and content of unemployment compensation fund.

There is established a special fund, to be known as the unemployment compensation fund, which shall be administered separate and apart from all public moneys or funds of the State. This fund shall consist of:

(1) All contributions and payments in lieu of contributions collected under Chapters 27 through 41 of this Title;

(2) Interest earned upon any moneys in the fund;

(3) Any property or securities acquired through the use of moneys belonging to the fund;

(4) All earnings of such property or securities;

(5) All money credited to this State's account in the unemployment trust fund pursuant to § 903 of the Social Security Act, as amended;

(6) All money received from the Federal Government as reimbursements pursuant to § 204 of the Federal-State Extended Compensation Act of 1970; and

(7) All money received for the fund from any other source. All money in the fund shall be commingled and undivided.

Code of Laws of South Carolina 1976, as amended:

§ 41-27-630. Liability of State and Commission for payment of benefits.

Benefits shall be deemed to be due and payable under Chapters 27 through 41 of this Title only to the extent provided in such chapters and to the ex-

tent that moneys are available therefor to the credit of the unemployment compensation fund and neither the State nor the Commission shall be liable for any amount in excess of such sums.

Amicus Brief for the United States

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No. 81-1972

In the Supreme Court of the United States

OCTOBER TERM, 1982

FRANCES E. PORCHER, ET AL., PETITIONERS

v.

MARY E. BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether a state violates the Federal Unemployment Tax Act, 26 U.S.C. 3304(a)(12), by imposing a disqualification from receipt of unemployment benefits on women who voluntarily leave their jobs for reasons related to pregnancy, when it imposes an identical disqualification on all claimants who voluntarily leave their jobs because of a physical illness or disability unrelated to their employment.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	25

TABLE OF AUTHORITIES

Cases:

(Alaska Employment Security Commission) Appeal Referee Decision No. A-2063, digested in 1B Unempl. Ins. Rep. (CCH) (Alaska ¶ 8027)	21
Batterton v. *Francis*, 432 U.S. 416	2
California Department of Human Resources Development v. *Java*, 402 U.S. 121	2
Cantrell v. *Kentucky Unemployment Insurance Commission*, 450 S.W.2d 235	21
Conover v. *Employment Division*, 26 Or. Ct. App. 671, 554 P.2d 603	22
Davis v. *Labor & Industrial Relations Commission*, 554 S.W.2d 541	19
DeLorenzo v. *Board of Review, Division of Employment Security*, 54 N.J. 361, 255 A.2d 248	21
Denby v. *Board of Review of Industrial Commission*, 567 P.2d 626	22
Diversified Asphalt, Inc. v. *Labor & Industrial Relations Commission*, 622 S.W.2d 716	19
Dohoney v. *Director of Division of Employment Security*, 377 Mass. 333, 386 N.E.2d 10	21
E. I. du Pont de Nemours & Co. v. *Collins*, 432 U.S. 46	13
Garrow v. *Levine*, 52 A.D.2d 708, 382 N.Y.S.2d 588	21
(Georgia) Board of Review Decision No. 1327, digested in 3 Unempl. Ins. Rep. (CCH) (Ga. ¶ 8232.02)	21
(Georgia) Board of Review Decision No. 2230, digested in 3 Unempl. Ins. Rep. (CCH) (Ga. ¶ 8276.10)	21

Cases—Continued Page

Goldman v. *Ohio Bureau of Employment Services*, digested in 8 Unempl. Ins. Rep. (CCH) (Ohio ¶ 1975.41) 21
(Hawaii Commission of Labor and Industrial Relations) Comm. Decision No. 0-9-39, digested in 4 Unempl. Ins. Rep. (CCH) (Hawaii ¶ 1975.404) .. 22
Heimsoth v. *Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 19
Lyons v. *Appeal Board of the Michigan Employment Security Commission*, 363 Mich. 201, 108 N.W.2d 849 21
Monroe v. *Standard Oil Co.*, 452 U.S. 549 8
Murphy v. *Fascio*, 115 R.I. 33, 340 A.2d 137 22
John R. Nelson, Pike Motor Co., & Employment Security Commission, In re, (North Carolina Employment Security Commission) Decision No. 4184, aff'd by judgment of N.C. Super. Ct., Wayne County, *reprinted in* 8 Unempl. Ins. Rep. (CCH) (N.C. ¶ 8524) 21
New York Telephone Co. v. *New York Department of Labor*, 440 U.S. 519 ..... 8, 14
(North Dakota job service) Appeal Tribunal Decision No. AT-4485-57, digested in 8 Unempl. Ins. Rep. (CCH) (N.D. ¶ 1975.401) 22
North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982) 13
Ohio Bureau of Employment Services v. *Hodory*, 431 U.S. 471 ..... 2, 14
Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 9
Reiter v. *Sonotone Corp.*, 442 U.S. 330 9
Ribera v. *Employment Security Commission*, 92 N.M. 694, 594 P.2d 742 19
Robinson v. *Unemployment Security Board of Review*, 181 Conn. 1, 434 A.2d 293 21
Rodrigues v. *Employment Security Department*, *reprinted in* 7 Unempl. Ins. Rep. (CCH) (Nev. ¶ 8214) 22
Sage Club, Inc. v. *Employment Security Commission*, 601 P.2d 1306 22

Cases—Continued Page

South Central Bell Telephone Co. v. *Department of Employment Security*, 389 So.2d 790 18
Southeastern Community College v. *Davis*, 442 U.S. 397 8
State v. *Hix*, 132 W.Va. 516, 54 S.E.2d 198 18
State Hospital, Jamestown v. *North Dakota Employment Security Bureau*, 239 N.W.2d 819..... 22
Steward Machine Co. v. *Davis*, 301 U.S. 548 14
Stone Mfg. Co. v. *South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E.2d 644 ..... 4, 15
Turner v. *Department of Employment Security*, 423 U.S. 44 9
(Utah Department of Employment Security) Appeal Referee Decision No. 49-A-639, digested in 10 Unempl. Ins. Rep. (CCH) (Utah ¶ 1975.09).. 22
(Virginia Employment Commission) Comm. Decision No. 5000-C, digested in 10 Unempl. Ins. Rep. (CCH) (Va. ¶ 8230.08) 21
(Virginia Employment Commission) Appeal Examiner Decision No. VI-71-1840, digested in 10 Unempl. Ins. Rep. (Va. ¶ 8237) 21
Wells v. *Lockwood*, 371 So.2d 1192 19

Statutes, regulations and rules:

Civil Rights Act of 1964, Title VII, 42 U.S.C. (Supp. IV) 2000e(k) 23
Federal Unemployment Tax Act, 26 U.S.C. (& Supp. IV) 3301 *et seq.* 1
26 U.S.C. 3301 2
26 U.S.C. 3302 2
26 U.S.C. 3304 2
26 U.S.C. 3304(a) 2, 3, 12
26 U.S.C. 3304(a)(12) ..... passim
26 U.S.C. 3304(a)(13) 3
26 U.S.C. 3304(a)(14) 3
26 U.S.C. 3304(c) 2-3, 6
Rehabilitation Act of 1973, Section 504, 29 U.S.C. 794 8

Statutes, regulations and rules—Continued — Page

Social Security Act of 1935, ch. 531, 49 Stat. 620, 42 U.S.C. (& Supp. IV) 301 *et seq.*:
Title III, 49 Stat. 626 (42 U.S.C. (& Supp. IV) 501 *et seq.*) 1
42 U.S.C. 502 2
42 U.S.C. 503 3
42 U.S.C. 503(a) 2, 12
Title IX, 49 Stat. 639 (26 U.S.C. 3301 *et seq.*) 1
42 U.S.C. 1983 5
Ala. Code § 25-4-78(2) a.1 (Supp. 1981) 17, 20
Ark. Stat. Ann. § 81-1106(a) (Supp. 1981) 20
Colo. Rev. Stat. § 8-73-108(4)(b) (Supp. 1980) 20
Del. Code Ann. tit. 19, § 3315(8) (1979) 20
Fla. Stat. Ann. § 443.101 (West 1981) 20
Idaho Code § 72-1366 (Supp. 1981) 22
Ill. Ann. Stat. ch. 48, § 431.B.1 (Smith-Hurd Supp. 1982-1983) 20
Ind. Code Ann. § 22-4-15-1(a) (Burns Supp. 1982) 17, 20
Iowa Code Ann. § 96.5.1.d (West Supp. 1982-1983) 17, 20
Kan. Stat. Ann. § 44-706 (1981) 20
Me. Rev. Stat. Ann. tit. 26, § 1193.1.A (Supp. 1981-1982) 20
Md. Ann. Code art. 95A, § 6(a) (Supp. 1982) 20, 23
Minn. Stat. Ann. § 268.09, subdivision 1(b) (West Supp. 1982) 20
Miss. Code Ann. § 71-5-513A.(1) (Supp. 1982) 20
Mont. Code Ann. § 39-51-2302(2) (1981) 20
Okla. Stat. Ann. tit. 40, §§ 2-404, 2-405 (West Supp. 1981-1982) 19
S.C. Code Ann. § 41-35-120 (Law. Co-op. 1977 & Supp. 1981) 3, 4
S.D. Codified Laws Ann. § 61-6-3 (1978) 20
Tenn. Code Ann. § 50-1324(A) (Supp. 1982) 20
Tex. Rev. Civ. Stat. Ann. art. 5221b-3(a) (Vernon Supp. 1971-1981) 20
Utah Code Ann. § 35-4-5 (Supp. 1981) 22

Statutes, regulations and rules—Continued — Page

Vt. Stat. Ann. tit. 21, § 1344(a)(3) (Supp. 1982).. 19
Wash. Rev. Code Ann. § 50.20.050(2)(b) (Supp. 1982) 20
W.Va. Code § 21A-6-3 (Repl. 1981) 18
Wisc. Stat. Ann. § 108.04(7)(c) (West 1974)..... 20
Arizona Department of Employment Security, Benefit Policy Rules, Ch. 3, Art. 50, Subj. 235 (1978), *reprinted in* 2 Unempl. Ins. Rep. (CCH) (Ariz. ¶ 1975.31) 19-20
California Unemployment Insurance Rule No. 1256-15(b), *reprinted in* 2 Unempl. Ins. Rep. (CCH) (Cal. ¶ 5219o) 20
District of Columbia Unemployment Compensation Act Rule 4612.7, *reprinted in* 3 Unempl. Ins. Rep. (CCH) (D.C. ¶ 5513) 19
(Hawaii Commission of Labor and Industrial Relations) Regulation II—Rule 5(c), *reprinted in* 4 Unempl. Ins. Rep. (CCH) (Hawaii ¶ 5314).. 21-22
(Idaho Employment Security) Rule 202-46, *reprinted in* 4 Unempl. Ins. Rep. (CCH) (Idaho ¶ 5675) 22
New Hampshire Unemployment Compensation Regulation No. 21, *reprinted in* 7 Unempl. Ins. Rep. (CCH) (N.H. ¶ 5021) 20
(Oregon State Employment Division) Administrative Rule § 30-38(6), *reprinted in* 8 Unempl. Ins. Rep. (CCH) (Or. ¶ 5217C) 22

Miscellaneous:

(Alaska) Employment Security Commission Manual (1955), digested in 1B Unempl. Ins. Rep. (CCH) (Alaska ¶ 1975.256) 21
Hearings on S. 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess. (1935) 13-14
H.R. Rep. No. 94-755, 94th Cong., 1st Sess. (1975) 11, 12, 15
1974 Pa. Att'y. Gen. Op. 29 (Official Op. No. 9).... 20

Miscellaneous—Continued Page

Phase I: Existing Unemployment Compensation Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means, 94th Cong., 1st Sess. (1975) 11, 12
S. Rep. No. 628, 74th Cong., 1st Sess. (1935) 13
S. Rep. No. 94-1265, 94th Cong., 2d Sess. (1976) .. 10
2A C. Sands, *Statutes & Statutory Construction* (4th ed. 1973) 9

In the Supreme Court of the United States

OCTOBER TERM, 1982

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Congress established a nationwide unemployment insurance system in 1935 in Titles III and IX of the Social Security Act, ch. 531, 49 Stat. 626, 639.[1] The system is a joint federal-state program, the purpose of which is to provide partial wage replacement

[1] Titles III and IX are now found at 42 U.S.C. (& Supp. IV) 501 *et seq.* and 26 U.S.C. (& Supp. IV) 3301 *et seq.*

for eligible workers during periods of unemployment.[2] Under the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, a payroll tax is levied on employers. An appropriation in an amount equal to the proceeds of the tax is used primarily to fund administrative costs of state programs administered in accordance with federal statutory requirements. See 42 U.S.C. 502, 1101. Employers within a state receive the benefit of credits against the FUTA tax for their contributions to state unemployment compensation funds if the state has adopted an unemployment compensation statute that meets federal requirements. See 26 U.S.C. 3302, 3304. All 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands have adopted qualifying unemployment compensation laws. Payment of unemployment benefits is funded largely from state unemployment funds.

Federal statutes define the basic outlines of the unemployment insurance system, but each state has its own comprehensive statute governing the program within that state. All state statutes must conform to certain federal standards set out in 26 U.S.C. 3304 (a) and 42 U.S.C. 503(a). The federal standard at issue in this case, found at 26 U.S.C. 3304(a)(12), prohibits states from denying unemployment compensation "solely on the basis of pregnancy or termination of pregnancy." The Secretary of Labor has the statutory responsibility for determining whether state laws fail to conform to federal standards. 26

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[2] See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 427 (1977); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 482-484, 487 n.15 (1977); *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-131 (1971).

U.S.C. 3304(c); 42 U.S.C. 503.[2] In other respects the details of the state programs are left to each state.

All states apply some version of a three-part test to determine whether an unemployed individual is entitled to receive unemployment benefits: (1) has the claimant earned a specified amount of wages or worked a specified number of weeks in covered employment during a one-year "base period"?; (2) if so, is the claimant "eligible"? (generally referring to whether the employee is able to work and available for work at the time he or she applies for benefits); and (3) if the claimant has earned the requisite amount of wages and is eligible, is he or she nevertheless "disqualified" for some reason?[4] Although the South Carolina policy at issue in this case is sometimes discussed in terms of eligibility, it actually involves disqualification, rather than eligibility, in the more precise sense of those terms.

Section 41-35-120 of the South Carolina Code governs disqualification of claimants. That section provides, inter alia, that a claimant will be ineligible for unemployment benefits "[i]f the [South Carolina Employment Security] Commission finds that he has

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[2] Each year, on October 31, the Secretary must certify each state whose unemployment compensation law he has previously approved under 26 U.S.C. 3304(a). The Secretary is directed, however, not to certify a state if, after reasonable notice and opportunity for a hearing, he finds that a state law is not in conformity with all the requirements of 26 U.S.C. 3304(a) or that the state is not complying substantially with such requirements. 26 U.S.C. 3304(c).

[4] The most common reasons for disqualification are leaving a job voluntarily without good cause, discharge on the basis of misconduct, and refusal to accept suitable employment. Federal standards require states to impose disqualifications in certain other cases. See, *e.g.*, 26 U.S.C. 3304(a)(12), (14).

left voluntarily without good cause his most recent work * * *."[5] S.C. Code Ann. § 41-35-120(1) (Law. Co-op. 1977 & Supp 1981). The South Carolina Supreme Court has construed the term "good cause" as limited to a cause attributable to or connected with a claimant's employment.[6] The South Carolina Employment Security Commission has issued an explanation listing 12 examples of personal reasons that would not constitute "good cause" within the meaning of the statute, including, for example, lack of transportation or the need to care for sick members of the family (C.A. App. 122). Also included among these examples are departures "due to pregnancy" or "for health reasons (even if under doctor's orders) unless job connected."[7] In 1972, the Commission issued Unemployment Compensation Instructions No. MC-135, which explains payment of benefits to pregnant and post-pregnant claimants (C.A. App. 120-121). The instructions state in part: "The statutory requirement that a claimant must be able and available to work

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[5] Disqualification under this provision continues until the claimant has secured employment again and has earned wages equal to at least eight times the weekly benefit amount.

[6] See *Stone Mfg. Co.* v. *South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E.2d 644, 647 (1951).

[7] Other personal reasons that do not constitute good cause for quitting under South Carolina law are (C.A. App. 122): job dissatisfaction without recent material change in working conditions; moving to another location; serving a jail or prison sentence; friction with a supervisor or co-workers unless harrassment by the employer or co-worker(s) is involved; distance to and from work without recent substantial change in job location; lack of child care; domestic problems; and work too difficult without recent material change in working conditions. South Carolina awards compensation to employees whose employers grant maternity leave and to employees who are discharged because of pregnancy (Pet. App. 20 n.2).

and must actively seek work can be no more stringently administered for pregnant and post-pregnant claimants than for other claimants who have had a temporary physical disability" (*id.* at 120). In addition, "[a]ny individual who voluntarily leaves her most recent work because of pregnancy is subject to the same disqualification provisions * * * as any other individual who voluntarily leaves for a personal reason not attributable to the employment" (*ibid.*).

2. In March 1979, respondents filed this class action in the United States District Court for the District of South Carolina, alleging that petitioners, who are officials of the South Carolina Employment Security Commission, violated 42 U.S.C. 1983 by denying respondents unemployment benefits when they sought to return to work after the termination of their pregnancies and were unable to obtain employment. Both of the named respondents had left their jobs because of sickness they experienced during the third or fourth month of pregnancy (Pet. App. 32, 34). Each sought to return to work within a few months of giving birth, but found that no work was available with her former employer (*id.* at 33, 34). Each then applied for unemployment benefits, which were denied by the Commission on the ground that pregnancy was a personal reason for quitting work and thus did not constitute "good cause" within the meaning of the South Carolina statute. Respondents contended that the denial of benefits violated 26 U.S.C. 3304(a)(12), the federal standard that prohibits states from denying benefits "solely on the basis of pregnancy or termination of pregnancy." [8]

[8] Respondents did not contend that they were entitled to receive benefits during the time they were unable to work and unavailable for work (Pet. App. 29). Nor did they allege that

Petitioners argued that South Carolina's policy does not violate 26 U.S.C. 3304(a)(12), since disqualifications are imposed for both voluntary quits because of pregnancy and voluntary quits because of other types of temporary physical disabilities. They contended that the federal standard only prohibits creation of a special category for pregnancy-related claimants and denial of benefits to those claimants (Pet. App. 21) and does not require states to treat pregnancy more favorably than other temporary physical disabilities. Petitioners cited the fact that the Secretary of Labor had certified South Carolina pursuant to 26 U.S.C. 3304(c). In addition, they submitted a letter from the Administrator of the Department of Labor's Unemployment Insurance Service, dated July 9, 1980 (C.A. 131-133), stating that South Carolina's law appeared to be consistent with the Department's interpretation of Section 3304(a)(12).

The district court held that South Carolina's policy violated Section 3304(a)(12) (Pet. App. 28-54). It awarded injunctive and monetary relief to respondents and the class they represent, including a retroactive award of benefits to January 1, 1978, the effective date of Section 3304(a)(12).

The court of appeals affirmed (Pet. App. 18-27). It concluded that "[r]egardless of how the Commission treats employees with other disabilities, the mandate of the statute is clear: the Commission cannot

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they were fired from their jobs or that their employers coerced them into quitting.

Respondents also argued that petitioners' actions denied claimants equal protection of the law. The courts below found it unnecessary to reach the constitutional question (Pet. App. 20 n.2, 49 n.21, 51 n.22).

deny compensation 'solely on the basis of pregnancy or termination of pregnancy' " (*id.* at 22). The court of appeals stated that the Secretary of Labor's certification of South Carolina is "neither controlling nor entitled to great weight," since South Carolina's law was not facially in conflict with the federal law and since the certification made no reference to the interpretation that the South Carolina Employment Security Commission had placed on the state law (*ibid.*).

On July 29, 1982, Justice Brennan denied petitioners' application for stay of enforcement of the judgment of the district court.

DISCUSSION

Although the court of appeals has decided a question of statutory interpretation that is of substantial concern to the Department of Labor and to at least some states, the United States is unable to conclude that the decision below warrants further review. The court's interpretation of a provision of the Federal Unemployment Tax Act conflicts with that of the Department. However, the court's decision does not directly affect the Department's administration of the Act, and the scope of the holding is uncertain. At least at this point, it appears that only a few states are likely to be directly affected by the decision. As yet, there is no conflict in the circuits on the FUTA question. Thus, while we believe that the court's interpretation of the Act is erroneous, that issue does not appear to warrant review by the Court at this time.

1. The court of appeals erroneously construed Section 3304(a)(12) in a manner that requires South Carolina to give preferential treatment to individuals who voluntarily leave their employment on account of pregnancy, as opposed to those who leave on account

of other types of temporary physical disability or other personal reasons not related to employment. The language of that section does not suggest that Congress intended to require states to give such preferential treatment. It provides that "no person shall be denied compensation * * * *solely* on the basis of pregnancy or termination of pregnancy" (emphasis added). Use of the word "solely" indicates that Congress meant to ban only those state laws that single out pregnancy for disadvantageous treatment.[9] The language does not suggest that a state must extend benefits to individuals who leave work voluntarily because of pregnancy when it has framed its program so as to deny benefits to those who leave work voluntarily for a host of reasons that are not employment-related, including health reasons and various other personal reasons of a compelling nature.[10] The court

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[9] This Court has rejected the argument that similar language in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, imposes an affirmative action, or preferential treatment, obligation on recipients of federal funds. Section 504 provides that "[n]o otherwise qualified handicapped individual" shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any federally-funded program "solely by reason of his handicap." In *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), the Court concluded that Section 504 does not compel an educational institution to make substantial modifications in its program to allow disabled persons to participate, but provides only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context. *Id.* at 405, 411. See also *Monroe* v. *Standard Oil Co.*, 452 U.S. 549 (1981) (employer not required to make work schedule accommodations for reservists, despite provision of Vietnam Era Veterans' Readjustment Assistance Act that prohibits denial of employment benefits because of reserve obligations).

[10] See *New York Telephone Co.* v. *New York Department of Labor*, 440 U.S. 519, 537-538 (1979) (plurality opin-

of appeals' interpretation, which ignores the word "solely," conflicts with the recognized principle that a statute should be construed so as to give effect, if possible, to every word Congress used. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); 2A C. Sands, *Statutes & Statutory Construction* § 46.06 (4th ed. 1973).

Nor does the legislative history of Section 3304(a)(12) indicate that Congress intended to require states to afford preferential treatment to pregnancy. Instead, Congress was concerned with eliminating statutes that embodied arbitrary assumptions about a woman's ability to work during the periods before and after childbirth. In 1975, when Section 3304(a)(12) was first introduced, many state unemployment compensation statutes included explicit "pregnancy disqualifications," *i.e.*, provisions that automatically denied unemployment benefits to a woman for a fixed period (most often a specified number of weeks) before and after childbirth. During the same year, this Court considered a challenge to one such provision. In *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975), the Court struck down a Utah statute that made pregnant women ineligible for unemployment benefits for a period extending from 12

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ion): "when Congress wished to impose or forbid a condition for [unemployment] compensation, it did so explicitly." Since Section 3304(a)(12) does not explicitly mandate preferential treatment of pregnancy as a condition to states' receipt of federal funds, it should not be assumed that Congress meant to impose such a condition. See also *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 24 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds").

weeks before the expected date of childbirth until six weeks after childbirth.

The Senate report accompanying the legislation that became Section 3304(a)(12) referred specifically to *Turner*-type statutes. The full text of the Senate report's discussion of the section states:

> In order to qualify for unemployment compensation benefits, a worker must be able to work, be seeking employment, and be available for employment. In a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a provision of this type in the Utah unemployment compensation statute to be unconstitutional. The Utah requirement had disqualified workers for a period of 18 weeks (12 weeks before birth through 6 weeks after birth). The Court stated that "a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid." A number of other States have similar provisions although most appear to involve somewhat shorter periods of disqualification.
>
> The committee bill includes, without modification, the provision of the House bill which would prohibit States from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.

S. Rep. No. 94-1265, 94th Cong., 2d Sess. 19-21 (1976).[11] The report suggests not that Congress in-

[11] The House report also referred to special disqualification provisions of state statutes that "are all inequitable in that

tended to require preferential treatment of pregnancy, but only that it was concerned with elimination of a variety of automatic pregnancy disqualification provisions contained in state laws at that time.

Questioning at congressional hearings also indicates that the primary concern was state statutes that singled out pregnancy as a ground for denying benefits. During subcommittee hearings, Margaret Dahm, Director of the Department of Labor's Office of Research Legislation and Program Policies, responded to questioning by Representatives Keys and Corman concerning sex discrimination in state unemployment compensation laws. Dahm described the primary problem in this area as

> the special provision for disqualifications in cases of pregnancy which treats inability to work because of pregnancy * * * as different from any other kind of physical disability.

Phase I: Existing Unemployment Compensation Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 86-87 (1975).[12] Representative Corman noted at the hearings that the concern was not with denial of benefits to a pregnant woman during the actual time of her incapacity to work, but rather "disqualification of a worker because

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they deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work." H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 50 (1975).

[12] Dahm also testified concerning state statutes that treated a voluntary quit because of family circumstances or domestic or marital obligations differently from, and less favorably than, other kinds of voluntary quits and that discriminated against women with respect to dependents' allowances. *Hearings, Phase I, supra*, at 87.

she has a physical condition that does not prevent her ability to work." *Id.* at 87.[13]

The Department of Labor, which played a role in development of the 1976 legislation, and which is the agency responsible for administering the federal standards, has consistently interpreted Section 3304 (a) (12) as a requirement that states not single out pregnancy as a ground for denying benefits, rather than as a requirement that they grant preferential treatment of pregnancy. The letter from the Administrator of the Department's Unemployment Insurance Service,[14] dated July 9, 1980, which is part of the record (C.A. App. 131-133), states the Department's position (*id.* at 131):

> [Section 3304(a)(12)] has been interpreted to require that the entitlement to benefits be determined on the same basis and under the same provisions applicable to all other claimants. It does

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[13] The House report does suggest that Congress was aware of statutes that disqualified a claimant who left work on account of pregnancy or whose unemployment was a result of pregnancy. See H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 7 (1975). However, it appears that Congress wished to ban only those statutes that singled out pregnancy for disadvantageous treatment. See *ibid.* (referring to "special disqualification provisions pertaining to pregnancy"). There is no indication that Congress intended to prevent states from applying more general disqualifications that extended to voluntary departures for a wide variety of reasons not related to employment.

[14] The Unemployment Insurance Service is a unit within the Employment and Training Administration of the Department of Labor. The Service, which is headed by a Director (formerly Administrator), is responsible for reviewing state laws to determine whether they conform to the federal standards set out in 26 U.S.C. 3304(a) and 42 U.S.C. 503(a).

> not mean that pregnant claimants are entitled to benefits without meeting the usual requirements of the State law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual and that benefits be paid or denied not on the basis of pregnancy but on the basis of whether the claimant meets the State statute's requirements for receipt of benefits.

The letter goes on to state (C.A. App. 132) that South Carolina's law is not inconsistent with Section 3304 (a)(12) because "it does not distinguish between pregnant claimants or any other unemployed individuals whose separation is determined to be due to illness." Because the Department of Labor is the agency responsible for administering the statutory conditions, its interpretation is entitled to considerable weight. See, *e.g.*, *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 9 n.12; *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977).

The Department's interpretation is consistent with the basic design of the unemployment insurance program, which Congress created as a cooperative federal-state scheme in which states would take sole responsibility for administration of the program within their own jurisdictions. The Senate committee stated in its report:

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, *the States are left free to set up any unemployment compensation system they wish, without direction from Washington.*

S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935) (emphasis added). See also Report of the Committee

on Economic Security, as *reprinted in Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 1326 (1935) ("all matters in which uniformity is not absolutely essential should be left to the States"). This Court has recognized that Congress gave "[a] wide range of judgment * * * to the several states as to the particular type of statute to be spread upon their books." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 593 (1937). See also *New York Telephone Co.* v. *New York Department of Labor*, 440 U.S. 519, 537 (1979) (plurality opinion). For the most part, decisions regarding eligibility criteria, disqualifications, waiting periods, benefit rates, and similar subjects have been the province of the states. See *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 483-484 (1977). Moreover, both the states and Congress have been concerned with protecting the fiscal integrity of state unemployment compensation programs, *id.* at 492-493, and with the possibility that states might grant eligibility greater than their funds could handle, *id.* at 484.

In light of Congress' "sensitiv[ity] to the importance of the States' interest in fashioning their own unemployment compensation programs," *New York Telephone Co.* v. *New York Department of Labor*, *supra*, 440 U.S. at 539, Section 3304(a)(12) should not be read to require that states alter their traditional approaches to disqualification for benefits, particularly in a manner that increases the financial obligations of their unemployment compensation funds, unless it is clear that Congress intended such a result.[15] The court of appeals' decision goes beyond

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[15] The legislative history suggests that Congress did not intend that the basic structure of state eligibility and disqualifi-

elimination of the sorts of special pregnancy disqualifications with which Congress was clearly concerned and requires at least some states to revamp their programs to give special treatment to pregnancy, resulting in greater financial strain for those states. The Secretary's interpretation of Section 3304(a)(12), which minimizes interference with state discretion in fashioning eligibility and disqualification provisions, is more consistent with the federal-state scheme established by Congress.

South Carolina has chosen to limit unemployment benefits to situations in which workers lose their jobs for economic or employer-initiated reasons. See *Stone Mfg. Co.* v. *South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E.2d 644, 647 (1951). Thus, South Carolina imposes disqualifications for a broad class of voluntary quits, including those for pregnancy and other health reasons, in which the employee's cause for leaving is not related to employment. Not all states limit entitlement to benefits so narrowly.[16] However, given the broad flexibility Congress allowed to states and its concern for the fiscal integrity of state unemployment compensation funds, South Carolina's choice is not an unreasonable one.

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cation provisions be altered. The House report states (H.R. Rep. No. 94-755, *supra*, at 50):

> Under eligibility provisions applicable to all claimants, including pregnant women, anyone who is physically unable to work or who is unavailable for work is ineligible for benefits. These determinations are made on the basis of the facts of each individual case and make discriminatory disqualifications because of pregnancy unnecessary.

[16] For example, a number of states have chosen not to impose disqualifications for voluntary departures because of physical disabilities or illness. See pages 19-22, *infra*.

Its policy does not single out pregnancy for disadvantageous treatment or rest on any presumption about a woman's ability to work or availability for work during or after pregnancy. Instead, like any other voluntary quit, a pregnant or post-pregnant woman is disqualified because of the leaving of her job for a non-work-related reason; ability to work and availability for work are irrelevant to the disqualification. While it might have been preferable in some respects if South Carolina had adopted a more generous program under which benefits would be available to at least some voluntary quits, the federal statute does not require such generosity. So long as South Carolina does not single out for disadvantageous treatment voluntary quits due to pregnancy, as opposed to voluntary quits for other health or personal reasons, there is no violation of Section 3304(a)(12).[17]

2.a. The potential impact of the court of appeals' interpretation of Section 3304(a)(12) is difficult to measure, in part because the scope of the court's holding is not well-defined. A limited reading of the decision below could allow states to impose conditions designed to ensure that benefits are paid to women whose absence from work is for medical reasons, rather than because of a personal preference. Thus, a limited reading might require payment of benefits only in the case of a woman who, for example, (a) leaves at the time she becomes sick or disabled as a

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[17] We address here only South Carolina's formal policy, as it is described in the written materials referred to in the statement at pages 3-5, *supra*. We make no attempt to analyze South Carolina's application of that policy, as reflected in the individual administrative decisions described in the district court's opinion and in other portions of the record.

result of her pregnancy (rather than at some earlier point), (b) notifies her employer of the reason for her departure and requests maternity leave if such leave is available, (c) presents medical verification of her inability to work, (d) communicates to the employer her intention to return to her job as soon as she is able, and (e) applies for reemployment with her former employer as soon as she is able to return to work.[18] A more expansive reading of the decision might require payment of benefits in other situations, including cases in which a woman leaves her job before she is actually disabled in medical terms, perhaps because of physical discomfort that does not rise to the level of disability, or stays away from work past the time she again becomes able to work following childbirth, in order to nurse her child or develop the mother-child relationship. We believe the limited reading of the decision would be appropriate, since a more expansive holding would interfere with the discretion of states to reserve unemployment benefits for those individuals who manifest an intent to re-

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[18] A number of state unemployment compensation programs impose one or more of these conditions on an individual who is forced to leave a job because of illness or disability, but who wishes to avoid disqualification. See, *e.g.*, Ala. Code § 25-4-78 (2) a.1 (Supp. 1981); Ind. Code Ann. § 22-4-15-1(a) (Burns Supp. 1982); Iowa Code Ann. § 96.5.1.d (West Supp. 1982-1983).

The named respondents in this case apparently left their jobs on the recommendations of their doctors because of illness related to pregnancy and notified their employers of the reason for their departures. Both appear to have intended to return to work as soon as possible and to have sought reemployment as soon as they were able to work again. See Pet. App. 32-33, 34; C.A. App. 141-143, 158-161. However, it is uncertain whether other members of the class acted in a similar manner.

main in the labor market. We believe conditions of the sort described above would not be inconsistent with the district court's order;[19] however, the courts below did not expressly limit the scope of their holdings in this respect.

b. Within the Fourth Circuit, South Carolina, and probably West Virginia,[20] will be affected by the decision below. The application for stay filed by South Carolina in this Court indicated (para. 7) that the State is paying additional benefits at a rate equivalent to almost $1.5 million per year as a result of this decision. In addition, South Carolina was ordered to pay substantial amounts for previous years. If West Virginia were to follow the Fourth Circuit interpretation of Section 3304(a)(12), the additional benefits it would have to pay probably would be in the same range as the amount being paid by South Carolina. On a nationwide basis, seven other states (Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, the District of Columbia, and, to a lesser extent, Vermont) appear to have policies like that of South Carolina, under which the leaving of a job for health reasons that are unrelated to employment will result in disqualification.[21]

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[19] The district court referred to leaving because of "pregnancy-related medical reasons" (Pet. App. 51), suggesting that in the court's view it is pregnancy-related illness or disability, rather than personal preference, that may not be a ground for denial of benefits under Section 3304(a)(12).

[20] Like South Carolina, West Virginia imposes a disqualification on individuals who leave a job for health reasons unrelated to employment. See W.Va. Code § 21A-6-3 (Repl. 1981); *State* v. *Hix*, 132 W.Va. 516, 54 S.E. 2d 198 (1949).

[21] See *South Central Bell Telephone Co.* v. *Department of Employment Security*, 389 So. 2d 790 (La. Ct. App. 1980);

The remainder of the states, including Maryland, North Carolina, and Virginia in the Fourth Circuit, appear to treat voluntary quits for health reasons differently than South Carolina. All states have some form of disqualification in the case of an individual who leaves his or her job voluntarily without good cause. However, some states have statutes or rules providing that leaving a job because of pregnancy-related illness or disability, or because of illness or disability generally, will not result in disqualification for benefits at the time the individual again is able to work, so long as the individual makes reasonable efforts to preserve his or her employment rights. Some of these statutes or rules provide specifically that leaving because of pregnancy-related illness or disability will not result in disqualification. States in this category include Arizona, Arkansas, California, Colorado, Iowa, Kansas, Mississippi, New Hampshire, Pennsylvania, South Dakota, Tennessee, and Texas.[22] Other

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Wells v. *Lockwood*, 371 So.2d 1192 (La. Ct. App. 1979); *Diversified Asphalt, Inc.* v. *Labor & Industrial Relations Commission*, 622 S.W.2d 716 (Mo. Ct. App. 1981); *Davis* v. *Labor & Industrial Relations Commission*, 554 S.W.2d 541 (Mo. Ct. App. 1977); *Heimsoth* v. *Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1, 3 (1982); *Ribera* v. *Employment Security Commission*, 92 N.M. 694, 594 P.2d 742 (1979); Okla. Stat. Ann. tit. 40, §§ 2-404, 2-405 (West Supp. 1981-1982); (District of Columbia Unemployment Compensation Act) Rule 4612.7, *reprinted in* 3 Unempl. Ins. Rep. (CCH) (D.C. ¶ 5513). In Vermont an individual who leaves for health reasons will be disqualified for a period of one to six weeks (the length of the disqualification determined in the discretion of the employment security commissioner). Vt. Stat. Ann. tit. 21, § 1344 (a) (3) (Supp. 1982).

[22] See Arizona Department of Employment Security, Benefit Policy Rules, Ch. 3, Art. 50, Subj. 235 (1978), *reprinted in*

states have statutes or rules that refer generally to illness or disability as reasons that will not lead to disqualification, without any specific mention of pregnancy. This group includes Alabama, Delaware, Florida, Illinois, Indiana, Maine, Maryland, Minnesota, Montana, Washington and Wisconsin.[23] In these states, leaving because of pregnancy-related illness or disability presumably would not result in disqualification, since states may not treat such illness or disability less favorably than other illness or disability. In still other states, judicial or administrative decisions indicate that no disqualification will be imposed for departure due to illness or disability. These states include Georgia, Kentucky, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, and

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2 Unempl. Ins. Rep. (CCH) (Ariz. ¶ 1975.31); Ark. Stat. Ann. § 81-1106(a) (Supp. 1981); California Unemployment Insurance Rule No. 1256-15(b), *reprinted in* 2 Unempl. Ins. Rep. (CCH) (Cal. ¶ 5219*o*); Colo. Rev. Stat. § 8-73-108(4)(b) (Supp. 1980); Iowa Code Ann. § 96.5.1.d (West Supp. 1982-1983); Kan. Stat. Ann. § 44-706 (1981); Miss. Code Ann. § 71-5-513A.(1) (Supp. 1982); New Hampshire Unemployment Compensation Regulation No. 21, *reprinted in* 7 Unempl. Ins. Rep. (CCH) (N.H. ¶ 5021); 1974 Pa. Att'y Gen. Op. 29 (Official Op. No. 9); S.D. Codified Laws Ann. § 61-6-3 (1978); Tenn. Code Ann. § 50-1324(A) (Supp. 1982); Tex. Rev. Civ. Stat. Ann. art. 5221b-3(a) (Vernon Supp. 1971-1981).

[23] See Ala. Code § 25-4-78 (2) a.1 (Supp. 1981); Del. Code Ann. tit. 19, § 3315(8) (1979); Fla. Stat. Ann. § 443.101 (West 1981); Ill. Ann. Stat. ch. 48, § 431. B.1 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. § 22-4-15-1(a) (Burns Supp. 1982); Me. Rev. Stat. Ann. tit. 26, § 1193.1.A. (Supp. 1981-1982); Md. Ann. Code art. 95A, § 6(a) (Supp. 1982); Minn. Stat. Ann. § 268.09, subdivision 1. (2)(b) (West Supp. 1982); Mont. Code Ann. § 39-51-2302(2) (1981); Wash. Rev. Code Ann. § 50.20.-050(2)(b) (Supp. 1982); Wisc. Stat. Ann. § 108.04(7)(c) (West 1974).

Virginia.[24] Other states that appear to regard compelling personal reasons as good cause for a voluntary quit probably would not impose a disqualification for a departure due to pregnancy. This category includes Alaska, Connecticut, Hawaii, Idaho, Nevada, North Dakota, Oregon, Rhode Island, Utah, and Wyoming.[25]

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[24] (Georgia) Board of Review Decision No. 2230 (1966), digested in 3 Unempl. Ins. Rep. (CCH) (Ga. ¶ 8276.10); (Georgia) Board of Review Decision No. 1327 (1957), digested in 3 Unempl. Ins. Rep. (CCH) (Ga. ¶ 8232.02); *Cantrell* v. *Kentucky Unemployment Insurance Commission*, 450 S.W. 2d 235, 237 (Ky. Ct. App. 1970); *Dohoney* v. *Director of Division of Employment Security*, 377 Mass. 333, 386 N.E.2d 10 (1979); *Lyons* v. *Appeal Board of the Michigan Employment Security Commission*, 363 Mich. 201, 108 N.W. 2d 849, 854-855 (1961); *DeLorenzo* v. *Board of Review, Division of Employment Security*, 54 N.J. 361, 255 A.2d 248, 250 (1969); *Garrow* v. *Levine*, 52 A.D. 2d 708, 382 N.Y.S. 2d 588, 589 (1976); *In re John R. Nelson, Pike Motor Co. & Employment Security Commission*, (North Carolina Employment Security Commission) Decision No. 4184, aff'd by judgment of N.C. Super. Ct., Wayne County (1970), *reprinted in* 8 Unempl. Ins. Rep. (CCH) (N.C. ¶ 8524); *Goldman* v. *Ohio Bureau of Employment Services* (Ohio Ct. App. 1977), digested in 8 Unempl. Ins. Rep. (CCH) (Ohio ¶ 1975.41, at 38,192); (Virginia Employment Commission) Comm. Decision No. 5000-C (1969), digested in 10 Unempl. Ins. Rep. (CCH) (Va. ¶ 8230.08); (Virginia Employment Commission) Appeal Examiner Decision No. VI-71-1840 (1971), digested in 10 Unempl. Ins. Rep. (CCH) (Va. ¶ 8237).

[25] (Alaska) Employment Security Commission Manual (1955), digested in 1B Unempl. Ins. Rep. (CCH) (Alaska ¶ 1975.256) (illness of family member may constitute good cause for leaving); (Alaska Employment Security Commission) Appeal Referee Decision No. A-2063 (1961), digested in 1B Unempl. Ins. Rep. (CCH) (Alaska ¶ 8027) (same); *Robinson* v. *Unemployment Security Board of Review*, 181 Conn. 1, 434 A.2d 293 (1980) (good cause may include personal reasons); (Hawaii Commission of Labor and Industrial

Within the Fourth Circuit, Maryland, North Carolina, and Virginia apparently would not be affected

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Relations) Regulation II—Rule 5(c), *reprinted in* 4 Unempl. Ins. Rep. (CCH) (Hawaii ¶ 5314) (good cause includes compelling reason, or reason that would cause reasonable and prudent worker desirous of maintaining employment to take similar action); (Hawaii Commission of Labor and Industrial Relations) Comm. Decision No. 0-9-39 (1939), digested in 4 Unempl. Ins. Rep. (CCH) (Hawaii ¶ 1975.404); Idaho Code § 72-1366 (Supp. 1981); (Idaho Employment Security) Rule 202-46, *reprinted in* 4 Unempl. Ins. Rep. (CCH) (Idaho ¶ 5675); *Rodrigues* v. *Employment Security Department* (Nev. Dist. Ct. 1979), *reprinted in* 7 Unempl. Ins. Rep. (CCH) (Nev. ¶ 8214) (implying claimant might have shown good cause if he had left work for health reasons); *State Hospital, Jamestown* v. *North Dakota, Employment Security Bureau*, 239 N.W.2d 819 (N.D. 1976) (good cause must be viewed from standpoint of employee, not employer); (North Dakota job service) Appeal Tribunal Decision No. AT-4485-57 (1957), digested in 8 Unempl. Ins. Rep. (CCH) (N.D. ¶ 1975.401) (conditions that affect health or physical condition of employee are of compelling nature and constitute good cause); (Oregon State Employment Division) Administrative Rule § 30-038(6), *reprinted in* 8 Unempl. Ins. Rep. (CCH) (Or. ¶ 5217C) (good cause is such that a reasonable person would leave work, or a cause of such gravity that an individual has no reasonable alternative except to leave); *Conover* v. *Employment Division*, 26 Or. Ct. App. 671, 554 P.2d 603 (1976); *Murphy* v. *Fascio*, 115 R.I. 33, 340 A.2d 137 (1975) (good cause where employee is forced to leave job to avoid illness); Utah Code Ann. § 35-4-5 (Supp. 1981) (no disqualification if claimant leaves work under circumstances of such nature that it would be contrary to equity and good conscience to impose disqualification); *Denby* v. *Board of Review of Industrial Commission*, 567 P.2d 626, 630 (Utah 1977); (Utah Department of Employment Security) Appeal Referee Decision No. 49-A-639 (1949), digested in 10 Unempl. Ins. Rep. (CCH) (Utah ¶ 1975.09). *Sage Club, Inc.* v. *Employment Security Commission*, 601 P.2d 1306, 1310 (Wyo. 1979) (language suggesting good cause would include compelling personal reasons).

by a limited reading of the decision below. However, an expansive reading of the decision (*e.g.*, one that required payment of benefits to women who leave their jobs before they are disabled or who do not return to work when they are again medically able to do so) could require these states to expand the class of persons to whom benefits are paid.[26]

c. There is some possibility that the court of appeals' decision will have less impact than otherwise expected because of the effect on employment practices of the 1978 amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. IV) 2000e(k). That amendment requires employers to treat women affected by pregnancy "the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." Employers that formerly granted sick leave or an unpaid leave of absence only for physical disabilities other than pregnancy must now offer comparable leave to women disabled by pregnancy. Thus, the 1978 amendment could operate to reduce the number of voluntary quits due to pregnancy if it causes employers to extend more liberal maternity leave benefits to women who plan to return to work.[27]

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[26] See, *e.g.*, Md. Ann. Code art. 95A, § 6(a) (Supp. 1982) (defining good cause to include a cause of such necessitous and compelling nature that the individual had no reasonable alternative except to quit and requiring an individual who leaves because of health to furnish a written statement from a doctor or hospital).

[27] If an employer were unable to reemploy a woman at the termination of a period of authorized maternity leave, the separation of the employee presumably would be classified as involuntary, *i.e.*, initiated by the employer, rather than voluntary, so that there would be no disqualification. Thus, fewer

d. We believe that the courts below interpreted Section 3304(a)(12) of the FUTA incorrectly and that the decision will have a substantial financial effect in at least South Carolina and probably in West Virginia (see page 18, *supra*). In addition, the court of appeals' decision calls into question the Secretary of Labor's interpretation of the FUTA and any decision he may make with respect to conformity of a state's law, or substantial compliance by the state, with the Act, thus interfering with the federal-state relationship under the FUTA.[28] However, as yet there is no conflict in the circuits, and this appears to be the only federal case in which the issue has been raised. The present uncertainty about the scope of the holding and the possible effect of the 1978 amendment to Title VII banning employment discrimination on the basis of pregnancy suggest that it may be premature for the Court to consider the issue now. For these reasons we are unable to conclude that the court of appeals' interpretation of Section 3304(a)(12) warrants further review at this time.

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women would be in the position of the named respondents in this case, who apparently were unable to obtain maternity leave from their employers. See C.A. App. 142, 144, 159.

[28] The decisions below do not directly affect the Secretary, who was not named as a party to the suit.

CONCLUSION

The petition for a writ of certiorari should be denied on the question of the interpretation of the Federal Unemployment Tax Act, 26 U.S.C. 3304(a)(12).

Respectfully submitted.

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Respondent's Reply Brief

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No. 81-1972

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OCTOBER TERM, 1981

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v.

MARY E. BROWN, on behalf of herself and all others similarly situated, and LIBERIA JOHNSON, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF RESPONDENTS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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REPLY OF RESPONDENTS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Respondents file this short Reply Brief to address the points made in the Brief for the United States as Amicus Curiae. We agree that the decision below will have little impact in States outside South Carolina, but we do not agree that the courts below erred in their

interpretation of the federal statute involved in this case. Rather, it is the Solicitor General's unusual interpretation of this simple statute, resting on an incomplete citation of the legislative history, which is erroneous. For this reason we believe the petition for a writ of certiorari should be denied, not only because there is no conflict in the circuits but also because the decision below was correct.

ARGUMENT

The aim of Congress when it enacted 26 U.S.C. § 3304 (a) (12) was to assure that a woman who was otherwise eligible to receive unemployment insurance payments—one able to work, available for work and looking for a job—would not be denied those payments "because she left work on account of her [pregnant] condition or because her unemployment is the result of pregnancy." [1]

The Solicitor General has argued that unemployment insurance payments can be denied a job-seeker who previously stopped working on account of pregnancy so long as the denial is the result of a policy under which "a pregnant claimant [will] not be treated differently under

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[1] H.R. Rep. No. 94-755, 94th Cong. 1st Sess., P. 7 (1975). As noted by the Solicitor General, Congress found statutes denying these benefits to be "all inequitable in that they deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work." *Ibid.*, p. 50.

Numerous other references throughout the legislative history underline Congress' desire to provide benefits so long as eligibility criteria—ability to work, availability for work, and efforts to find work—are met. S. Rep. No. 94-1265, 94th Cong., 2d Sess., pp. 19-21 (1976); Committee Print of the Subcommittee on Unemployment Compensation of the Ways and Means Committee of the House of Representatives, "Information to Accompany H.R. 10210 . . .," p. 12 (1975); Committee Print, "Unemployment Compensation Amendments of 1976: Description of the Provisions of H.R. 10210 (Public Law 94-566)," Prepared by the Staffs of the Senate Committee on Finance and the House of Representatives Committee on Ways and Means, p. 6 (1976); 122 Cong. Rec. 22516 (Rep. Abzug, July 19, 1976); 22518 (Rep. Steiger, July 19, 1976).

the law from any other unemployed individual." Brief for the United States as Amicus Curiae, p. 13. His discussion of the merits does not support that conclusion.

First, the language of the statute is plainly and unambiguously contrary to his position. Second, the evolution of the statute as it went through the legislative process indicates that it was intended as more than an anti-discrimination statute. Third, South Carolina's policy, stripped of all complications, denies unemployment compensation on the theory that women who left work solely because of pregnancy have "voluntarily quit" their jobs; in light of the language, history and overall context of the 1976 federal statute, it is simply not credible to argue that Congress meant to allow a state to disqualify pregnant women by the simple expedient of labeling their departure "voluntary."

1. In urging that the lower courts were in error, the Solicitor General argues that 26 U.S.C. § 3304(a)(12) has been misinterpreted. That provision reads: "no person shall be denied [unemployment] compensation under . . . state law solely on the basis of pregnancy or termination of pregnancy." This misinterpretation is said to result from the lower courts having ignored the word "solely" when they constructed the statute. They did not.

In this case, as in any case involving statutory construction, the "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). In doing so, the lower courts gave the words used by Congress in § 3304(a)(12) their plain and ordinary meaning. *Maine v. Thiboutot*, 448 U.S. 1 (1980). The word "solely" is defined as meaning, in the context of § 3304(a)(12), "to the exclusion of all else." See, e.g., Webster's New Collegiate Dictionary (1977). In reviewing the policies challenged by appellees, the lower courts recognized that in every instance affected by their decisions, the women in question stopped working *solely* because of pregnancy, *i.e.*, pregnancy was the ex-

clusive reason for stopping work. In each case, the women in question were denied unemployment compensation and the exclusive reason for that denial was that they had previously stopped working because of pregnancy. Their cases thus fit the precise language of the federal statute.

The Solicitor General's interpretation, on the other hand, requires the law to be rewritten as if it said "no person shall be denied compensation *discriminatorily* because of pregnancy."[2] That is not the language chosen by Congress, however, and the fact that another person is also denied benefits because of a different physical condition does not gainsay the fact that these class members have been denied benefits solely because of pregnancy.[3]

Finally, the Solicitor General's reading of the statute means that Congress' words "solely on the basis of pregnancy" have one meaning in South Carolina, and the opposite meaning in almost every other state. The courts below properly read Congress' language so that the same words consistently have the same meaning.

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[2] *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), does not support the position of the Solicitor General. That case did not discuss the meaning of "solely"; instead, it held that "otherwise qualified" meant "qualified in spite of" a handicap, rather than "qualified except for" a handicap. That case also was a nondiscrimination statute, that expressly prohibited discrimination, rather than mandating benefits to an entire class of persons.

[3] One may wish that a person who leaves work because of another physical condition would be eligible for unemployment benefits upon recovery—as is true in more than 40 states—but that is not the problem that Congress focused on, and there is no indication that Congress thought a disqualification for leaving on account of pregnancy would be more equitable just because another group not focused on in the hearings was also disqualified. Congress could, of course, remedy one disqualification without eliminating every other disqualification that might also be inequitable. Dandridge v. Williams, 397 U.S. 471 (1970).

2. Given the plain language of the statute, the investigation need go no further. "Because the statute is unambiguous, resort to legislative history is unwarranted." Sutherland, Statutes and Statutory Construction § 46.04 (4th ed. C. Sands 1973) Petition, p. 22. However, some of the most compelling evidence that § 3304(a)(12) was intended to be more than an anti-discrimination statute is found in the evolution of the language of 3304(a)(12), an evolution that has been omitted by the Solicitor General.[4]

The first draft of the present law introduced in the 94th Congress was H.R. 8366 and its companion S. 2079. That draft contained a paragraph providing:

> "no person shall be denied compensation under such state law solely on the basis of pregnancy and determinations under any provision of such State law relating to voluntary terminations of employment,

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[4] In addition to the evolution of the statutory language, there are a number of other pieces of evidence supporting Respondents' interpretation of the statute. First, the Solicitor General argues that Congress only intended to abolish "*Turner*-type" statutes (pp. 9-11); yet he offers no explanation for why the effective date of the statute was delayed for two years (1976 to 1978) after the decision in *Turner*. See Brief in Opposition to Certiorari, p. 6 n.3. Second, Congress had focused on denials of benefits resulting from the *condition* of pregnancy (see *supra*, text and n. 1), and found that such denials were inequitable because they operated even when women were able to work, available for work and seeking work, not inequitable because only pregnant women were denied benefits under those circumstances. Third, the fragments of legislative history cited by the Solicitor General do not support Petitioners' strained reading of the statute. The Senate Report cited on page 10 refers to presumptive disqualification statutes, but refers only to meeting the "generally applicable criteria of availability for work and ability to work" to receive benefits, which is precisely what Respondents' contend. The Dahm testimony on page 11 is referred to by the Solicitor General as describing the *primary* problems as discriminatory disqualifications but it is clear that the discussion as a whole, and Congress' aim in the statute as finally adopted was a comprehensive challenge to the various barriers that kept post-pregnant women from receiving unemployment benefits.

> availability of work, active search for work or refusal to accept work shall not be made *in a manner which discriminates on the basis of pregnancy.* H.R. 8366 § 8 (Emphasis added.)

This first draft was the sort of antidiscrimination statute envisioned by the Solicitor General's interpretation. The antidiscrimination language was deleted, however, and by the time another bipartisan bill (H.R. 10210) was ultimately adopted, the pregnancy provision had been transformed into its present form. The present version eliminates all reference to banning "discrimination." By striking this limiting language, the drafters made clear their intent to write something more comprehensive than the antidiscrimination statute which appeared in the initial bill. Congress demonstrated a clear intent to enact broad, remedial legislation.[5] Recognizing the broad, remedial purpose of the law, the lower courts construed the statute to give effect to its remedial purpose. Petition, pp. 21 and 47. *Tcherepnin v. Knight*, 389 U.S. 332 (1967).

3. As noted in our Brief in Opposition to Certiorari, "Prior to this litigation, petitioners reasoned that women compelled by pregnancy to stop working temporarily had 'voluntarily quit' their jobs 'without good cause.'" (p. 2) Congress expressly intended that "the decision when to terminate one's employment because of pregnancy is an

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[5] The Solicitor General cites a letter from the Department of Labor to support its contrary conclusion. That letter is supposed to represent the position "consistently" espoused by the agency regarding the scope of § 3304(a)(12). In fact, it is the only effort of record in which anyone at the agency tried to construe the statute. The letter was solicited specifically for use in *this* case after litigation had commenced in the District Court. While the letter purports to butress Petitioner's position, it fails to cite any authority to support its views and contains no discussion of the legislative history of the statute. Given how it came into being and because its analysis is so superficial, it is entitled to little weight. St. Martin's Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981); Southeastern Community College v. Davis, supra at 411.

individual one to be decided by the woman and her doctor." 122 Cong. Rec. 22516 (Rep. Abzug, July 19, 1976) Yet under the South Carolina practice, at issue here, when a woman ceases work on advice of her physician, she is held, as was Respondent Mary E. Brown, to have "voluntarily quit" her employment. Petition, p. 32; see also pp. 36-39. No one can believe that in passing this law Congress thought a pregnant woman whose physician has advised her not to work could be declared to have "voluntarily quit" her employment, and thus be disqualified for benefits.

This is especially so because the practical effect of that interpretation is to eviscerate the statute. The Solicitor General states that "South Carolina awards compensation to employees whose employers grant maternity leave and to employees who are discharged because of pregnancy." (page 4, n.7) This is a very incomplete statement, and suggests that many pregnant women can qualify for benefits. In fact, however, the leave provisions cover only those few women who are granted maternity leave and who (1) are assigned a specific date to return to work after leave; (2) seek to return to work *only* on that day; *and* (3) are not re-employed. Petition p. 36, esp. n.9) Since it is now generally a violation of Title VII, very few women are discharged because of pregnancy. 42 U.S.C. § 2000e(k). Therefore, as a practical matter, the policy in South Carolina effectively denies benefits to most of the entire class of pregnant women whom § 3304(a)(12) was intended to protect.

CONCLUSION

Congress, in 1976, addressed an issue of major national importance: the guaranteeing of unemployment benefits for women job seekers who are temporarily displaced from employment by pregnancy. Congress initially considered an explicit non-discrimination approach to this problem, but chose, finally, broad language which prohibited denial

of benefits where the exclusive disqualifying factor was the condition of pregnancy.

The interpretation urged by the Solicitor General is inconsistent with the literal meaning of the statute; ignores the evolution of the statutory language; and attempts to override the plain language of the statute with a speculative interpretation of a few fragments of the legislative history. The Solicitor General endorses a state policy that, expressly contrary to the Congressional debates, forfeits benefits if a woman follows her doctor's advice, and operates to deny benefits to almost all post-pregnant women.

In sum, the petition for certiorari should be denied, not only because there is no issue of sufficient importance to warrant review by this Court, but also because the Courts below correctly interpreted the statute in question.

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